PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

JACK R. MANSFIELD, SR.,
Petitioner,

v.

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Federal Circuit erred in determining what constitutes a valid "application for benefits" by a veteran under 38 U.S.C. § 1151 and thus departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the court below, the U.S. Court of Appeals for Veterans Claims, so as to call for an exercise of the Court's supervisory power.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner Jack R. Mansfield, Sr., makes the following disclosure:

The petitioner is a private citizen and has no corporate affiliations.

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INTRODUCTORY PRAYER

The petitioner respectfully requests that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on May 12, 2008, and the order denying *en banc* review dated August 11, 2008. (App., infra, 75a).

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, *Mansfield v. Peake*, No. 2007-7282 (Fed. Cir. 05/12/2008), denying an earlier effective date for the veteran's benefits (App., infra, 1a-13a) is not reported. The two single judge opinions of the United States Court of Appeals for Veterans' Claims (*Mansfield v. Principi*, Greene, C.J., CAVC 02-2230, December 2, 2004, remanding for further proceedings)(App., infra, 49a-55a), and (*Mansfield v. Nicholson*, Hagel, J., CAVC 05-1165, May 16, 2007, affirming the Board of Veteran's Appeals and denying an earlier effective date for the veteran's benefits) (App., infra, 17a-25a) are not reported.

JURISDICTION

The Court of Appeals for the Federal Circuit entered its judgment on August 11, 2008 (App., infra, 75a). This Petition is timely filed according to Supreme Court Rules 13.1 and 3.3. This Court derives jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

United States Code, Title 38:

Section 1151:

Benefits for persons disabled by treatment or vocational rehabilitation

(a) Compensation under this chapter [38 USCS §§ 1101 et seq.] and dependency and indemnity compensation under chapter 13 of this title [38 USCS §§ 1301 et seq.] shall be awarded for a qualifying additional disability or a qualifying death of a veteran in the same manner as if such additional disability or death were service-connected. For purposes of this section, a disability or death is a qualifying additional disability or qualifying death if the disability or death was not the result of the veteran's willful misconduct and--

(1) the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary, either by a Department employee or in a Department facility as defined in section 1701(3)(A) of this title [38 USCS § 1701(3)(A)], and the proximate cause of the disability or death was--

(A) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination; or

(B) an event not reasonably foreseeable; or

* * *

(b) (1) Where an individual is on or after December 1, 1962 awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 [28 USCS § 1346(b)], or on or after December 1, 1962 enters into a settlement or compromise under section 2672 or 2677 of title 28 [28 USCS § 2672 or 2677], by reason of a disability or death treated pursuant to this section as if it were service-connected, then (except as otherwise provided in paragraph (2)) no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability or death becomes final until the aggregate amount of benefits which would be paid but for this subsection equals the total amount included in such judgment, settlement, or compromise.

* * *

Amendments:

* * *

1991. Act Aug. 6, 1991, redesignated this section, formerly 38 USCS § 351, as 38 USCS § 1151, and substituted "administered by the Secretary" for "administered by the Veterans' Administration".

1996. Act Sept. 26, 1996 (effective 10/1/97 unless legislation is enacted providing for an earlier date, as provided by § 422(c) of such Act, which appears as a note to this section) substituted subsec. (a) for the former first sentence, which read: "Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected."; and designated the second sentence as subsec. (b) and, in such subsection as so designated, deleted ", aggravation," following "disability" in two places and substituted "subsection" for "sentence".

* * *

The relevant regulations from the Code of Federal Regulations include:

38 C.F.R. § 3.150:

"§ 3.150 Forms to be furnished.

(a) Upon request made in person or in writing by any person applying for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form will be furnished.

(Authority: 38 U.S.C. 5102)

(b) Upon receipt of notice of death of a veteran, the appropriate application form will be forwarded for execution by or on behalf of any dependent who has apparent entitlement to pension, compensation, or dependency and indemnity compensation.
If it is not indicated that any person would be entitled to such benefits, but there is payable an accrued benefit not paid during the veteran's lifetime, the appropriate application form will be forwarded to the preferred dependent. Notice of the time limit will be included in letters forwarding applications for benefits.

(c) When disability or death is due to Department of Veterans Affairs hospital treatment, training, medical or surgical treatment, or examination, a specific application for benefits will not be initiated.

[26 FR 1570, Feb. 14, 1961, as amended at 30 FR 133, Jan. 7, 1965; 67 FR 40867, June 14, 2002]

38 U.S.C. 501(a).

[EFFECTIVE DATE NOTE: 67 FR 40867, June 14, 2002, revised the cross reference at the end of the section, effective June 14, 2002.]"

38 CFR § 3.154:

"§ 3.154 Injury due to hospital treatment, etc.

> VA may accept as a claim for benefits under 38 U.S.C. 1151 and Sec. 3.361 any communication in writing indicating an intent to file a claim for disability compensation or dependency and indemnity compensation under the laws governing entitlement to veterans' benefits for disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program, whether such communication is contained in a formal claim for pension, compensation, or dependency and indemnity compensation or in any other document.

[27 FR 11887, Dec. 1, 1962; 69 FR 46426]

38 C.F.R. § 3.400. General.

38 C.F.R. § 3.400(i):

> Except as otherwise provided, the effective date of an evaluation and award of pension,

compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later.

(Authority: 38 U.S.C. 5110(a))

* * *

(i) Disability or death due to hospitalization, etc. (38 U.S.C. 5110 (c), (d); Pub. L. 87-825; §§3.358, 3.361, and 3.800) --
(1) Disability.
Date injury or aggravation was suffered if claim is received within 1 year after that date; otherwise, date of receipt of claim.

* * *

[26 FR 1593, Feb. 24, 1961; 54 FR 34981 (1989); 55 FR 20148 (1990); 56 FR 25044 (1991); 57 FR 10426 (1992); 58 FR 32443 (1993); 60 FR 18356, April 11, 1995; 60 FR 52862, 52863, Oct. 11, 1995; 61 FR 67949, 67950, Dec. 26, 1996; 62 FR 5528, 5529, Feb. 6, 1997; 68 FR 34539, 34542, June 10, 2003; 69 FR 46426, Aug. 3, 2004; 71 FR 44915, August 8, 2006]

[EFFECTIVE DATE NOTE: 68 FR 34539, 34542, June 10, 2003, revised the headings for paragraphs (b)(1) and (e), effective June 10, 2003.]"

STATEMENT OF THE CASE

A. Factual Background.

The Petitioner served in the military from January 1955 to January 1957. On March 11, 1987, he filed VA Form 21-526 in a claim for disability benefits relating to his non-service related back condition with the United States Department of Veterans Affairs (hereafter VA), then the Veterans Administration.

In March of 1989 he suffered a perforated bowel and post surgical infection related to gall bladder surgery in a VA medical center. After extensive treatment to include additional surgical intervention he returned home. He filed an administrative claim on Form SF-95 seeking compensation under the Federal Tort Claims Act (hereafter FTCA), for medical malpractice at the Detroit Veterans Affairs Regional Office (hereafter VARO), on January 3, 1991 (App., infra, 80a). V.A. Regional offices are responsible for the adjudication of benefits claims and are part of the Veterans Benefits Administration of the U.S. Department of Veterans Affairs. The Medical centers are part of the Veterans Health Administration.

The administrative claim was not resolved and the petitioner brought an action in the U.S. Federal District Court for the Eastern District of Michigan on August 2, 1991, *Mansfield v. United States*, docket number 91 CV 73811 DT (App., infra, 90a-100a) . As the date of receipt by the Secretary of his Form SF-95 was more than one year after his injury in March of 1989, January 3, 1991 becomes the earliest effective date possible for his benefits under 38 U.S.C. § 1151, 38 C.F.R. §§ 3.150(c) and 3.400 (i).

A settlement was reached in the tort action on January 17, 1993 (App., infra, 101a-102a). On June 11, 1993, the Director, VA Compensation and Pension Service, sent a letter to VARO Detroit. He instructed them to develop the benefits claim under 38 U.S.C. § 1151 and to apply the offset regulation until the FTCA award had been recaptured (App., infra, 125a).

No further action was taken on the benefits claim until October 5, 2000, when the claim of the petitioner resulted in a rating decision regarding the § 1151 benefits. Mr. Mansfield appealed a VA rating decision which granted him 100% benefits under 38 U.S.C. § 1151 effective October 13, 2000. On October 29, 2002, the BVA issued a decision under Docket Number 02-00 283 (BVA 1) (App., infra, 56a-74a) which granted an effective date for the claim of Mr. Mansfield of June 11, 1993, the date of the letter from the VA Director of Compensation and Pension Service to VARO Detroit.

The conduct of the VARO staff which ignored the June 11, 1993, letter of instruction from the Director of Compensation and Pension Service for over 87 months was not considered a violation of the right of due process of Mr. Mansfield. The petitioner is typical of claimants for VA benefits. He is of advanced age and in poor health. If he dies during the pendency of his claim, the claim dies with him.

B. Proceedings Below.

A notice of appeal was filed and assigned docket number 02-2230. The U.S. Court of Appeals for Veterans Claims, (CAVC), Greene, J., issued a *per curiam* order dated December 2, 2004, remanding the case to the BVA for an explanation of why, in view of

the language in 38 CFR § 3.154 and the June 11, 1993 letter, an earlier effective date was not established (CAVC 1, App., infra, 49a-55a).

On March 31, 2005 the Board issued a second decision in docket number 02-00 283 (BVA 2) which was essentially the original decision. (App., infra, 26a-48a). A second notice of appeal was filed and docket number 05-1165 was assigned. On May 16, 2007, Hagel, J., issued a *per curiam* opinion adopting the position of the BVA and the Secretary (CAVC 2)(App., infra, 17a-25a). The U.S. Court of Appeals for Veterans Claims permits single judge decisions. *See Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990). In this case the petitioner was poorly served as a matter of first impression was not fully reviewed. In this case two CAVC judges reached opposite conclusions on the same facts. Also troubling is that the rules of the Court do not provide for superintending control over cases remanded. This is extremely significant as a vast majority of the cases which come before the CAVC are disposed of by remand. See Haley, Sarah M., *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, *Administrative Law Review*, American Bar Association, Vol. 56, Number 2, Spring 2004, pages 535-574.

The petitioner filed a motion for a panel decision on June 6, 2007. That motion was denied by an order dated July 23, 2007. Judgment was entered on July 25, 2007 and the order became final and appealable. Mr. Mansfield filed his Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit on July 30, 2007, pursuant to 38 U.S.C. § 7292(a).

The case was assigned docket number 2007-7282. Oral argument was held and the court rendered a decision dated May 12, 2008, adopting the position of the Secretary that the earliest effective date for the claim of Mr. Mansfield was June 11, 1993, the date of the letter from the VA Director of Compensation and Pension Service to VARO Detroit. A request for panel rehearing and rehearing *en banc* was filed and denied on August 11, 2008. (App., infra, 75a).

REASONS FOR GRANTING THE WRIT

When the United States Congress created the Department of Veteran Affairs the intent was that the Department would improve the provision of services to the nations veterans and their families. The U.S. Court of Appeals for Veterans Claims, formerly Court of Veterans Appeals, was created at the same time. The Congressional intent was not to create and adversarial system. Quite the opposite, the VA benefits system like the social security system, is intended to be *ex parte*, claimant friendly and non-adversarial. See *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998); *Sims v. Apfel*, 530 U.S. 103 (2000). The case under review is an example of the disturbing trend of revolving door litigation of appeals by the VA.

Unfortunately, these types of cases appear to be increasing in frequency just at the time when the VA is confronted with the claims of young veterans with families and aging and infirm veterans such as the petitioner who must race against time in order to obtain their benefits. See Horan, Michael P., *Real Remedy Needed for VA Error, Tommy,* Federal Bar Association, Issue 1, 2004, page 5.

This case has now been in continuous litigation since January 3, 1991. This case, and the appeals of many others that will follow if this decision is allowed to stand, warrants review by this Court.

A. *Brown v. Gardner*, 513 U.S. 115 (1994)- The Secretary must follow his own regulations, to include those requiring the assignment of effective dates for claims under Section 1151.

The issue is one of first impression, but is closely related to the dispute addressed by this Court in *Brown v. Gardner*, 513 U.S. 115 (1994). In this case, the regulations requiring review are not in conflict with the statute, they have inexplicably been ignored or circumvented by the Secretary of Veterans Affairs.

The VA Director of Compensation and Pension Service made a determination on June 11, 1993, that a claim for benefits had been presented and instructed the VA Regional Office in Detroit, Michigan, to develop the claim. (App., infra, 125a). Over a decade later the existence of a claim is still an issue in litigation. In the letter of instruction the director wrote that:

"A tort claim was filed against the Government by the veteran. The veteran alleged negligence by medical staff at Ann Arbor VAMC on March 1, 1989, and treatment thereafter. The veteran alleged inadequate gallbladder surgery. This claim was settled for $164,471.22. Such settlement does not represent an admission of negligence by the Department of Veterans Affairs.

Where a tort claim against the United States is concluded on or after December 1, 1962, by judgment,

settlement, or compromise based on the same disability or death for which entitlement to benefits is established under 38 U.S.C. § 1151, such benefits are subject to offset under 38 CFR § 3.800(a)(2).

Review of the claims folder reveals a claim for benefits has been filed which meets the requirements of 38 CFR § 3.154. Accordingly, development should be undertaken in accordance with M21-1, part IV, ¶ 22.03 et seq. Upon completion of the required development, the material received, together with the claims folder, should be referred to the rating board for a decision as to entitlement to benefits under 38 U.S.C. § 1151. If the decision is favorable, benefits payable will be subject to offset as explained above. In any event, the amount of the settlement received by the veteran is countable as income for pension purposes." The letter was signed by J. Gary Hickman, Director, Compensation and Pension-Service.

There is no indication of equivocation and there is no precatory language such as "if a claim" or "when a claim is filed". The Director clearly states that a claim "has been filed".

The SF-95 and Summons and Complaint filed in Federal District Court (App., infra, 90a) set forth facts and allegations in enough detail to place the VA on notice of the injuries suffered due to negligent hospital care and thus to meet the standard for an informal claim. There is adequate notice to the VA of the §1151 claim of Mr. Mansfield under modern notice pleading standards. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

During oral argument and in the opinion under review the Court of Appeals for the Federal Circuit made much of the admission by Mr. Mansfield that he had no recollection of filing a claim for benefits under 38 U.S.C. § 1151 prior to October of 2000 (App., infra, 77a-79a) . That is his truthful statement. Consider that Mr. Mansfield almost died and was seriously ill after March of 1989. He was ably assisted by legal counsel in the preparation and litigation of his claim under the Federal Tort Claims Act. The determination by Mr. Hickman, then the 4th ranking veterans benefits official in the VA, that a claim had been perfected is entitled to great deference. Even if his action was that of a *de facto* officer it would be valid. See *Ryder v. United States*, 515 U.S. 177, 180 (1995).

A July 26, 2001, press release from the Department of Veterans Affairs described the duties and responsibilities of the Director of Compensation and Pension Service.

He is "responsible for direct management of VA procedures to provide timely financial assistance to veterans, their dependents and survivors, keeping VA programs in line with changes in law, sometimes complex court rulings and emerging veteran needs. The Compensation and Pension Service works closely with veterans groups, state officials and other VA offices, federal agencies and congressional representatives.

* * *

Compensation and pension policies guide VA field offices where veteran's applications for benefits are initially decided. About 2.7 million veterans currently

are on VA's rolls. Some receive monthly compensation for illnesses or injuries incurred when they were in service. Others, who are wartime veterans who become totally disabled in civilian life, receive pensions that raise income to established levels.

These national policies also effect a variety of other VA services such as certain burial benefits and health care of dependents of certain service-connected veterans.

Policies and regulations developed by the Compensation and Pension Service also affect cash benefits for nearly 600,000 widows, widowers, dependent children and some parents of those who died in service or from a service-connected disability, as well as the survivors of disabled wartime veterans with limited means."

The Director of Compensation and Pension Service reports to the Under Secretary for Benefits. The Undersecretary reports to the Secretary of Veterans Affairs.

The confounding delay in complying with the order from Mr. Hickman has compromised the record. There may have been additional documents available to him at the time he made his determination that did not survive the 87 month hiatus in adjudicating the § 1151 claim.

The letter of June 11, 1993, is compelling circumstantial evidence that a claim was present in the file in 1993. Circumstantial evidence is good evidence, and in this claimant friendly system of benefits the hyper technical and *ad hoc* standards

being advocated by the Secretary are inappropriate. An official correspondence from the Director of Compensation and Pension Service is entitled to the presumption of regularity. See *Butler v. Principi*, 244 F.3d 1337 (Fed. Cir. 2001); *Miley v. Principi*, 366 F.3d 1343 (Fed. Cir. 2004).

An immediate adjudication of the § 1151 claim would have produced a more competent record for review. The Secretary now assigns an effective date which is contrary to his own regulation at a cost of over two years of compensation to the petitioner.

B. *Michalic v. Cleveland Tanker, Inc.*, 364 U.S. 325 (1960); Circumstantial evidence is sufficient to establish a fact. The presumption of regularity placed the decision of June, 1993, by the VA director of compensation and pension service beyond review absent a showing of clear error. Once the VA conceded that a claim had been filed the Secretary is bound by the controlling regulation, 38 C.F.R.§ 3.400(i) and must assign an effective date for benefits of January 3, 1991.

The untoward delay in the adjudication of the processing the § 1151 claim created the gaps in the record before the agency. The letter of June 11, 1993 is clear and unambiguous. The requirements of 38 C.F.R.§ 3.154 had been met at that time. This review may have involved the application of 38 C.F.R.§ 3.150 (c) in concert with the documents from the Federal Tort Claims Act (FTCA) claim and correspondence from counsel. We do not know. But the surviving documents indicate that the petitioner placed the agency on notice of the FTCA claim in January of 1991.

The Secretary was sued in Federal District Court by Mr. Mansfield. He elected to settle the case prior to trial. The VA Director of C & P Service reviewed the matter after the settlement and determined that a claim under § 1151 had been perfected. Once that determination had been made it remained for the VARO staff in Detroit to assign the proper disability percentage rating and diagnostic code(s), the proper effective date for the benefits and establish offset for recapture of the court settlement amount for the claim. The record is now silent as to what formed the basis for the decision of the director that a claim had been perfected. "Direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 (1957), n. 17." *Michalic v. Cleveland Tanker, Inc.*, 364 U.S. 325, 330 (1960). See also *Herman & Maclean v. Huddleston et al*, 459 U.S. 375 (1983) footnote 30: "In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient. *Michalic v. Cleveland Tanker, Inc.*, 364 U.S. 325, 330 (1960). See *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 463, and n. 24 (1976)."

The Secretary is bound to follow his own regulations. The VA claims adjudication process is intended to be *ex parte*, claimant friendly and non-adversarial.

Some of the same abuses encountered in this case were the subject of review in *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959). This Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates. *See Service v. Dulles*, 354

U.S. 363, 372 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

Rather than apply the appropriate laws and regulations for determining the effective date for a claim under § 1151 the Board falls short of the standard set by King Solomon and actually "cuts the baby in half" (See *I Kings*, 3:16-28). They adopt the date of the letter from the director, C & P to VARO Detroit as an effective date. This "feel good" approach may be expedient, but it is devoid of any support in the law and has worked a manifest injustice upon Mr. Mansfield.

Mr. Mansfield did not file his tort claim during the first year after his injury. He is limited to the date of the filing of his SF-95 which was received by the VA on January 3, 1991. Under 38 C.F.R. § 3.400(i) that is the earliest effective date which can be assigned.

The result determined by the Board and upheld by the most recent order of the CAVC is without legal authority. The specific provisions of the regulations which govern a claim and effective date for benefits under 38 U.S.C. § 1151 are 38 C.F.R. § 3.150 (c) and 38 C.F.R. § 3.400(i). They must be followed. Accord *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

The CAVC discussed the interpretation of the language of a regulation in *Roper v. Nicholson*, 20 Vet. App. 173 (2006).

""See 2A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION, § 46:05 (6th ed. 2000) [hereinafter SUTHERLAND] ("[T]he court will not only consider the particular statute [or regulation]

in question, but also the entire legislative [and regulatory] scheme of which it is a part."); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991) (holding that when interpreting a statute [or regulation], the court is required to look at the context and provisions of law as a whole); *Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1564 (Fed. Cir. 1995) (holding that all parts of a statute must be construed together without according undue importance to a single or isolated portion). Moreover, the VA statutory and regulatory scheme "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." SUTHERLAND, § 46:06; *see also Splane v. West*, 216 F.3d 1058, 1068-69 (Fed. Cir. 2000). * * *

Determining a regulation's plain meaning "requires examining the specific language at issue and the overall structure of the statute [and applicable regulations]." *Gardner v. Derwinski*, 1 Vet. App. 584, 586 (1991) [hereinafter *Gardner I*], *aff'd sub nom. Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994); *see also Splane*, 216 F.3d at 1068-69 ("Canons of construction . . . require us to give effect to the clear language of a [regulation] and avoid rendering any portions meaningless or superfluous."). Where the plain meaning of a regulation is discernable, that "plain meaning must be given effect unless a 'literal application of [the regulation] will produce a result demonstrably at odds with the intention of its drafters.'" *Gardner I*, 1 Vet. App. at 587 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458

U.S. 564, 571, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982))."

In this case the options available to the Secretary for effective dates were March of 1989, the date of injury, January 1991, the date the SF-95 was filed for the FTCA claim, or August 2, 1991, the date the FTCA action was docketed in Federal District Court. June 11, 1993 is not an option under any regulation relevant to this dispute. The approach to this case more closely resembles an action in equity rather than a modern administrative action governed by regulation.

CONCLUSION

The petition for a writ of *certiorari* should be issued to review the judgment and opinion of the U.S. Court of Appeals for the Federal Circuit. If *Certiorari* is not granted, the Court permits the hyper technical and overly complex constructs of the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit in this case which are contrary to the intent of congress that the Secretary of Veterans Affairs operate a uniquely pro-claimant benefits system which is *ex parte* and non-adversarial.

Mr. Justice Jackson in his dissent in *Federal Crop Insurance Corp. v. Merrill et al*, 332 U.S. 380 (1947), could have been writing of this case when he observed "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one way street."

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2007-7282

[DECIDED: May 12, 2008]

JACK R. MANSFIELD, SR.,
Claimant-Appellant,

v.

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in 05-1165, Judge Lawrence B. Hagel.

Before NEWMAN, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

Robert P. Walsh, of Battle Creek, Michigan, argued for claimant-appellant.

David A. Harrington, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellee. With him on the brief were

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Martin F. Hockey, Jr.*, Assistant Director. Of counsel on the brief were *David J. Barrans*, Deputy Assistant General Counsel, United States Department of Veterans Affairs, of Washington, DC.

OPINION

SCHALL, *Circuit Judge*.

Jack R. Mansfield, Sr. appeals the decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") that affirmed the decision of the Board of Veterans' Appeals ("Board") that June 11, 1993 is the earliest effective date for Mr. Mansfield's award of Department of Veterans Affairs ("VA") benefits under 38 U.S.C. § 1151. *Mansfield v. Nicholson*, No. 05-1165, 2007 WL 1599726 (Vet. App. May 16, 2007). Because the Veterans Court did not err in its determination that Mr. Mansfield's 1991 negligence claim under the Federal Tort Claims Act ("FTCA") did not form the basis for an earlier effective date, we affirm.

BACKGROUND

I.

In March 1989, Mr. Mansfield underwent gallbladder surgery at a Department of Veterans Affairs medical facility. His bowel was perforated during the surgery, which resulted in various postoperative complications and procedures, including a permanent colostomy. Mr. Mansfield subsequently elected to pursue a claim for negligence under the

FTCA. *See* 28 U.S.C. § 1346(b)(1) (1988). On January 3, 1991, he submitted to the VA a Standard Form 95 ("SF-95"), seeking $500,000 in compensation for his injuries.[1] Mr. Mansfield's wife also submitted an SF-95, claiming $250,000 for her loss of services and consortium. When the Mansfields' claims were not resolved administratively, they initiated suit in the United States District Court for the Eastern District of Michigan, seeking a combined total recovery of $750,000 under the FTCA. The Mansfields eventually settled their claims for a total of $164,471.22 ($125,000 for the Mansfields and $39,471.22 for their attorney). Accordingly, the district court dismissed the case with prejudice on February 17, 1993.

Upon settlement, Mr. Mansfield's VA claims file was transferred to the VA Central Office located in Washington, D.C. On June 11, 1993, J. Gary Hickman, the VA's Director of Compensation and Pension Services, sent a letter to the VA Regional Office in Detroit, Michigan. The letter explained that Mr. Mansfield's negligence claim had been settled and that, pursuant to 38 C.F.R. § 3.800(a)(2), any award of VA benefits based on the same disability was subject to offset by the amount of the settlement. The letter further stated:

> Review of the claims folder reveals a claim for benefits has been filed which meets the requirements of 38 CFR § 3.154. Accordingly,

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[1] Mr. Mansfield was required, under 28 U.S.C. § 2675(a), to present his claim to the VA before initiating suit under the FTCA. A claimant may satisfy the requirements of section 2675(a) by submitting an SF-95. *See* 28 C.F.R. § 14.2(a) (1990).

> development should be undertaken . . . . Upon completion of the required development, the material received, together with the claims folder, should be referred to the rating board for a decision as to entitlement to benefits under 38 U.S.C. § 1151. . . .

The record does not reflect that the VA Regional Office took any action with respect to this letter.

II.

On October 5, 2000, Mr. Mansfield submitted a Form 21-4138 ("Statement in Support of Claim") to the VA. On that form, he claimed entitlement to VA benefits for the permanent colostomy he endured as a result of his March 1989 surgery. The VA granted Mr. Mansfield's request for benefits pursuant to 38 U.S.C. § 1151. In general terms, section 1151 provides that veterans disabled as a result of negligent treatment at VA medical facilities shall be compensated as if their disabilities are service-connected. *See* 38 U.S.C. § 1151(a) (2000).[2] The VA assigned an effective date of October 13, 2000 for Mr. Mansfield's disability, which corresponded to the date Mr. Mansfield's Form 21-4138 was received.[3] In addition, however, the VA notified Mr. Mansfield that his monthly checks would be withheld until an amount equaling his FTCA

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[2] *Accord* 38 U.S.C. § 351 (1988).

[3] Because Mr. Mansfield did not file a claim within one year of his injury, the effective date of his award is the date on which his "claim" for VA benefits was received. *See* 38 U.S.C. §§ 5110(a), (c) (2000); 38 C.F.R. § 3.400(i) (2007); *accord* 38 U.S.C. §§ 3010(a), (c) (1988); 38 C.F.R. § 3.400(i) (1990).

settlement had been recovered. *See* 38 U.S.C. § 1151(b) (2000); 38 C.F.R. § 3.800(a)(2) (2007).[4]

Mr. Mansfield subsequently appealed to the Board, arguing for an earlier effective date. Among other things, he contended that his January 3, 1991 SF-95 submission constituted an informal claim for section 1151 benefits. In order to determine whether Mr. Mansfield's SF-95 constituted a claim for section 1151 benefits, the Board turned to the governing VA regulation, which provided:

> A formal claim for pension, compensation, dependency and indemnity compensation or *any statement in a communication showing an intent to file a claim for disability or for death benefits* resulting from the pursuit of a course of vocational rehabilitation, hospitalization, medical or surgical treatment, or examination under Department of Veterans Affairs laws may be accepted as a claim.

38 C.F.R. § 3.154 (2002) (emphasis added).[5] Under this standard, the Board concluded that Mr. Mansfield's SF-95 submission did not constitute a claim for section 1151 benefits. That was because his SF-95 did not contain an expression of intent to apply for such benefits. Rather, the SF-95 merely indicated Mr. Mansfield's intent to file a claim for tort damages,

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[4] *Accord* 38 U.S.C. § 351 (1988); 38 C.F.R. § 3.800(a)(2) (1990).

[5] The Board cited the 2002 version of 38 C.F.R. § 3.154. However, because section 3.154 remained unchanged from 1962 to 2004, the 2002 version cited by the Board reflects the language in effect during the relevant time period in this case.

which, the Board reasoned, was quite different from a claim for VA benefits.

Notwithstanding its conclusion with respect to the SF-95, the Board determined that Mr. Mansfield was entitled to an effective date earlier than October 13, 2000—the effective date that had been assigned by the VA. The basis for that earlier effective date was the Director's June 11, 1993 letter. The Board was unable to reconcile its conclusion that there was no document in the record satisfying the requirements of 38 C.F.R. § 3.154 with the Director's contrary statement, recited above, that "[r]eview of the claims folder reveals a claim for benefits has been filed which meets the requirements of 38 CFR § 3.154." The Board stated: "In the absence of any means for reconciling the conflict, the Board must find that the evidence of record with respect to the question of whether a claim was in fact of record in June 1993 is in relative equipoise and that the benefit of the doubt must be resolved in favor of the veteran." The Board therefore held that Mr. Mansfield's claim for section 1151 benefits was entitled to an effective date of June 11, 1993.

After initially remanding the case to the Board for additional explanation, the Veterans Court affirmed. The court agreed with the Board's conclusion that Mr. Mansfield's SF-95 did not constitute a claim for section 1151 benefits and that he was therefore not entitled to an effective date of January 3, 1991. *Mansfield*, 2007 WL 1599726, at *3. The court disagreed, however, with the Board's determination that Mr. Mansfield was entitled to an effective date of June 11, 1993 based upon the Director's letter. *Id.* at *4. The court stated that "the proper effective date for Mr. Mansfield's

award of VA benefits is October 3, 2000," since no document in the record could constitute a claim for VA benefits until that date. *Id.* Nevertheless, the court explained that it would not disturb the effective date assigned by the Board because the error resulted in a benefit to Mr. Mansfield. *Id.* This appeal followed. We have jurisdiction over the appeal pursuant to 38 U.S.C. § 7292.

DISCUSSION

I.

On appeal, Mr. Mansfield presents two arguments. He first contends that the Board and Veterans Court erred in denying an effective date of January 3, 1991. He argues that, under a correct interpretation of the relevant VA regulations, the submission of an SF-95 notifying the VA of a negligence claim under the FTCA constitutes an informal claim for section 1151 benefits. Second, Mr. Mansfield argues that the VA's delay with respect to developing his claim for section 1151 benefits, despite the Director's instruction to do so, amounted to a denial of due process.

Our authority to review decisions of the Veterans Court is governed by statute. Pursuant to 38 U.S.C. § 7292(c), we have "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." However, "[e]xcept to the extent that an appeal under this chapter presents a constitutional issue, [we] may not review (A) a challenge to a factual determination, or (B) a challenge

to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2) (2000). Mr. Mansfield's arguments plainly invoke our jurisdiction under section 7292. His first contention relates to the interpretation of VA regulations; his second presents a constitutional issue. We address each of these, in turn.

II.

We first address Mr. Mansfield's argument that, under VA regulations, the submission of an SF-95 constitutes an informal claim for section 1151 benefits. He specifically argues that, in concluding to the contrary, the Veterans Court failed to apply 38 C.F.R. § 3.150(c), which provides: "When disability or death is due to Department of Veterans Affairs hospital treatment, training, medical or surgical treatment, or examination, *a specific application for benefits will not be initiated*" (emphasis added).[6] According to Mr. Mansfield, the import of this regulation is that claims for disability benefits as a result of VA hospital care do not require the submission of any specific application. He argues that his FTCA SF-95 submission put the VA on notice of his core contention: that he was entitled to compensation for the injuries he sustained as a result of his gallbladder surgery. In rejecting his SF-95 as an informal claim for section 1151 benefits, he contends, the Veterans Court disregarded the lenient standard set forth in 38 C.F.R. § 3.150(c).

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[6] The quoted language reflects the current version of 38 C.F.R. § 3.150(c), which has not been amended since 1965.

The government responds that the Veterans Court correctly determined that an SF-95 cannot constitute a claim for section 1151 benefits.[7] The government argues that the mere submission of an SF-95, in connection with a claim for negligence under the FTCA, does not satisfy the requirements of 38 C.F.R. § 3.154—the regulation that sets forth the requirements for a "claim" for section 1151 benefits. Specifically, the government contends that an SF-95 is not a "communication in writing indicating an intent to file a claim for disability compensation . . . *under the laws governing entitlement to veterans' benefits* for disability or death due to VA hospital care . . . ." 38 C.F.R. § 3.154 (2007) (emphasis added).[8] The government highlights several differences between the FTCA and the veterans' benefits system, explaining that an injured veteran has the option of pursuing either or both remedies. Thus, the government argues, there is no reason to conclude that notice of an FTCA claim—in the form of an SF-95 submission—indicates an intent to apply for veterans' benefits. According to the government, 38 C.F.R. § 3.150(c) must be read together with 38 C.F.R. § 3.154 such that, "while a specific application for section 1151 benefits will not be required, a claim for section 1151 benefits must nevertheless demonstrate an intent to seek such benefits." Appellee's Br. 20.

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[7] The government does not seek reversal of the Board's determination that Mr. Mansfield is entitled to an effective date of June 11, 1993 based upon the Director's letter.

[8] The government cites the current version of 38 C.F.R. § 3.154, as amended on August 3, 2004.

Both parties agree that the earliest effective date for Mr. Mansfield's section 1151 benefits corresponds to the date on which his claim for section 1151 benefits was received. They disagree, however, with respect to whether his SF-95 constitutes a "claim" for section 1151 benefits. We agree with the government that, under VA regulations in effect during the operative time period, an SF-95 does not constitute an informal claim for section 1151 benefits—at least where it merely provides notice of a veteran's intent to pursue a claim under the FTCA.

We first note that Congress has provided the VA with authority to establish the requirements for "claims" for veterans' benefits.

> A specific claim in the form prescribed by the Secretary [of Veterans Affairs] . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary.

38 U.S.C. § 5101(a) (2000).[9] In accordance with that authority, the VA promulgated 38 C.F.R. § 3.154, which governs "claims" for section 1151 benefits. The outcome of this case is controlled by the language of 38 C.F.R. § 3.154 in effect when Mr. Mansfield submitted his SF-95 on January 3, 1991:

> A formal claim for pension, compensation, dependency and indemnity compensation or *any statement in a communication showing an intent to file a claim for disability or for death*

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[9] *Accord* 38 U.S.C. § 3001(a) (1988).

> *benefits* resulting from the pursuit of a course of vocational rehabilitation, hospitalization, medical or surgical treatment, or examination *under Department of Veterans Affairs laws* may[10] be accepted as a claim.

38 C.F.R. § 3.154 (1990) (emphases added). Thus, Mr. Mansfield's SF-95 did not constitute a claim for section 1151 benefits unless it indicated "an intent to file a claim for disability or for death benefits . . . under Department of Veterans Affairs laws." For the following reasons, we do not think that was the case.

The FTCA waives sovereign immunity for certain tort claims against the United States. The FTCA is not specific to the Department of Veterans Affairs; rather, it applies to a "personal injury or death caused by the negligent or wrongful act or omission of *any* employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1) (1988) (emphasis added). It is thus clear that an SF-95 itself is not a "claim for disability or for death benefits . . . under Department of Veterans Affairs laws." Nor, we

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[10] The use of "may" instead of "will" could be interpreted to mean that the VA has discretion to determine whether to accept a communication as a claim for benefits, even where it otherwise meets the requirements of 38 C.F.R. § 3.154. *See Stewart v. Brown*, 10 Vet. App. 15, 18 (1997). We do not reach that question in this appeal, however, as the government here has simply argued that Mr. Mansfield's SF-95 does not meet the standard set forth in 38 C.F.R. § 3.154. Indeed, the government's brief even states that "under 38 C.F.R. § 3.154, VA *will* accept as a claim for benefits under 38 U.S.C. § 1151 'any communication in writing' as long as the writing 'indicat[es] an intent to file a claim for disability compensation . . . under the laws governing entitlement to veterans' benefits.'" Appellee's Br. 20 (emphasis added).

think, does an SF-95 evidence an *intent* to file such a claim. The FTCA and the veterans' benefits system provide two distinct remedies. The FTCA allows claimants to pursue adversarial tort claims against the government. Absent settlement, claims under the FTCA are decided by federal district courts applying state law. *See* 28 U.S.C. § 1346(b)(1). In contrast, section 1151 claims are governed by the non-adversarial procedures that apply to claims for veterans' benefits. A claimant may elect to pursue either of these remedies, or even both. Nevertheless, the manner in which each claim is resolved remains fundamentally different. Thus, we do not think that an SF-95 providing notice of a tort claim against the VA reflects the requisite "intent to file a claim for disability or for death benefits . . . under Department of Veterans Affairs laws."

Indeed, the VA emphasized the distinction between the two remedies when it revised the language of 38 C.F.R. § 3.154 in 2004. The new regulation provides:

> VA may accept as a claim for benefits under 38 U.S.C. 1151 . . . any communication in writing indicating an intent to file a claim for disability compensation . . . *under the laws governing entitlement to veterans' benefits* for disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program, whether such communication is contained in a formal claim . . . or in any other document.

38 C.F.R. § 3.154 (2004) (emphasis added). The VA explained that the phrase "under the laws governing

entitlement to veterans' benefits" was intended to clarify that claims under the FTCA do not constitute claims for section 1151 benefits. *See Department of Veterans Affairs Remarks Accompanying 2004 Revision of Section 3.154*, 69 Fed. Reg. 46,426, 46,427 (Aug. 3, 2004). The VA further stated:

> Because a claimant has the option of pursuing a tort claim without simultaneously pursuing a section 1151 claim, we do not believe that a claim submitted to VA seeking damages under the Federal Tort Claims Act should routinely be construed by VA as a claim for benefits under 38 U.S.C. 1151 . . . . Accordingly, we believe it is appropriate to provide that a claim will be construed as a claim for benefits under 38 U.S.C. 1151 . . . only if the veteran intended to seek those benefits as distinguished from monetary damages under the Federal Tort Claims Act.

Id. These statements by the VA are consistent with our interpretation of the prior version of 38 C.F.R. § 3.154.

We do not agree with Mr. Mansfield that 38 C.F.R. § 3.150(c), which provides that "a specific application for benefits will not be initiated," compels a different result. Generally, an informal claim for VA benefits is processed in two steps. First, the VA determines whether the veteran's submission satisfies the standard for an informal claim—i.e., whether the communication "indicat[es] an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs." 38 C.F.R. § 3.155(a) (1990). Second, upon receipt of an informal claim, the

VA forwards a formal application form to the veteran. *Id.* If the veteran subsequently submits the form within one year, the veteran's formal claim will be deemed to have been received as of the date of receipt of the informal claim. *Id.*

Informal claims for section 1151 benefits, however, are processed differently. The VA still takes the first step of determining whether an "informal claim" has been filed under the standard set forth in 38 C.F.R. § 3.154, discussed above. However, 38 C.F.R. § 3.150(c)—titled "Forms to be furnished"—provides that the VA will not commence the second step of forwarding a formal application form to the veteran for completion, where the veteran is applying for section 1151 benefits. Thus, while the veteran is not required to submit a "specific application" for section 1151 benefits, 38 C.F.R. § 3.150(c), the veteran's submission must nevertheless satisfy the standard for an "informal claim" set forth in 38 C.F.R. § 3.154.

Nothing in the SF-95 that Mr. Mansfield filed with the VA indicates, or even suggests, that he thereby was making a claim for veterans' disability benefits. His only claim on that form, which is captioned "CLAIM FOR DAMAGE, INJURY, OR DEATH," was for $500,000 for "PERSONAL INJURY." The form further stated that "I . . . AGREE TO ACCEPT [SAID] AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM." This document is similar to the same form filed on the same day by his wife, seeking $250,000 for "a loss of services and consortium." The claim in Mr. Mansfield's SF-95 is the same claim made in his FTCA suit for the same amount he filed several months later in the district court. The SF-95 was just what it purported to be: the

administrative agency claim seeking damages for tortious misconduct that is a prerequisite to filing an FTCA suit based on the same conduct. It was not a claim for veterans' disability benefits.

III.

Next, we address Mr. Mansfield's due process argument. In particular, he contends that the VA's delay in processing his claim for VA benefits amounted to a denial of due process under the Fifth Amendment. However, even if Mr. Mansfield's entitlement to section 1151 benefits constituted a cognizable property interest,[11] his claim would fail. For the reasons stated above, Mr. Mansfield's SF-95 was not a claim for section 1151 benefits. In addition, the Veterans Court found as a factual matter that Mr. Mansfield submitted no other document to the VA prior to his October 5, 2000 formal claim for section 1151 benefits.[12] The VA promptly developed his claim and issued a decision awarding benefits on May 15, 2001. Further, Mr. Mansfield has been retroactively awarded benefits effective June 11, 1993. The present dispute only concerns his entitlement to benefits for the period of January 3, 1991 to June 11, 1993. With respect to

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[11] *See Cook v. Principi*, 318 F.3d 1334, 1352–53 (Fed. Cir. 2002) (en banc) (Gajarsa, J., dissenting) (arguing that an applicant for veterans' benefits possesses a property interest of sufficient magnitude to invoke the protection of due process). We, of course, do not reach this question.

[12] Indeed, Mr. Mansfield admitted that he was not even aware—until he was informed by his physician—that he could submit a claim for section 1151 benefits. Thereafter, he filed his Form 21-4138 on October 5, 2000.

the disputed benefits, Mr. Mansfield has been afforded a great deal of process, including two Board decisions, two decisions of the Veterans Court, and this appeal.

CONCLUSION

For the foregoing reasons, the decision of the Veterans Court affirming the Board's decision establishing June 11, 1993 as the earliest effective date for Mr. Mansfield's disability benefits under 38 U.S.C. § 1151 is affirmed.

AFFIRMED

COSTS

Each party shall bear its own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-1165

[Filed: May 16, 2007]

JACK R. MANSFIELD, SR., APPELLANT,

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

HAGEL, *Judge*: Jack R. Mansfield, Sr., appeals through counsel a March 31, 2005, decision of the Board of Veterans' Appeals (Board) wherein the Board determined that June 11, 1993, was the appropriate effective date for Mr. Mansfield's award of VA benefits under 38 U.S.C. § 1151. The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review

the Board's decision. A single judge may conduct that review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). Because the only error in the Board's decision involves a finding favorable to Mr. Mansfield, the Court will affirm the Board's decision.

I. FACTS

Mr. Mansfield served on active duty in the U.S. Army from January 1955 to January 1957. In March 1989, he underwent gallbladder surgery at a VA medical facility. During surgery, Mr. Mansfield's bowel was perforated resulting in postoperative complications, including necrotizing pancreatitis and necessitating a permanent colostomy.

Mr. Mansfield and his wife, Elaine Mansfield, each submitted an SF 95 ("Claim for Damage, Injury, or Death") with a VA regional office,[1] which were stamped as received by the VA district counsel on January 3, 1991. These documents asserted a legal right to damages pursuant to the Federal Tort Claims Act. The claim was not resolved administratively and in August 1991, Mr. and Mrs. Mansfield filed an action against the United States in the U.S. District Court for the Eastern District of Michigan. The complaint filed by the Mansfields alleged negligence of the United States in providing medical treatment to Mr. Mansfield at the VA hospital in Ann Arbor, Michigan. Mr. and Mrs. Mansfield each sought damages, the

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[1] An SF 95 form initiates a claim pursuant to the Federal Tort Claims Act and is submitted to the Federal agency whose employee was involved in the incident that forms the basis of the claim.

total sought amounting to $750,000. Both Mr. and Mrs. Mansfield were represented by an attorney in this matter. The lawsuit was settled in February 1993 and a copy of the settlement agreement was forwarded to VA. Upon receipt of this agreement, a member of a VA office identified as the "Advisory Review Staff" requested that Mr. Mansfield's claims file be transferred to the VA central office in Washington, D.C.

In June 1993, the Director of Compensation and Pension Service in Washington, D.C., sent a letter to the VA regional office director in Detroit, Michigan, stating that, where a tort claim against the United States based on the same disability for which entitlement to benefits is established under 38 U.S.C. § 1151 is concluded by settlement, such benefits may be offset by the settlement. The letter included a statement that "[r]eview of the claims folder reveals a claim for benefits has been filed which meets the requirements of 38 C.F.R. § 3.154 [(1993)]." Record (R.) at 130. Based on this determination, the director ordered development, followed by adjudication of entitlement to benefits under section 1151. The record does not reflect that any action was taken with respect to this letter.

In October 2000, Mr. Mansfield obtained representation through a veterans service organization and with the assistance of that organization submitted a VA Form 21-4138 ("Statement in Support of Claim") in which he stated that he had claimed entitlement to VA benefits under section 1151 for the injury resulting from his gallbladder surgery at a VA facility in March 1989. In May 2001, Mr. Mansfield was granted benefits and assigned a 100% disability rating,

effective October 2000. Mr. Mansfield appealed the issue of the appropriate effective date of his award and, in December 2001, was awarded an effective date of June, 11, 1993, the date of the letter provided by the Director of Compensation and Pension Service noting that a claim had been filed. Mr. Mansfield continued to appeal the issue of his assigned effective date.

In December 2004, his claim was remanded by this Court to require the Board to provide adequate reasons or bases for why he was not entitled to an effective date prior to June 11, 1993. The Court asked the Board to reconcile the its finding that a claim for VA benefits under section 1151 had not been filed prior to October 2000 with its recognition that the June 1993 letter contained an explicit reference to a claim having been filed and its decision to award an effective date based on that reference. The Court found that the Board's explanation that the record did not indicate that Form SF 95 was intended as an informal claim for benefits was inconsistent with the 1993 letter referring to some document already in the file that he considered a claim for VA benefits. Finally, the Court noted the permissive language of 38 C.F.R. § 3.154 (1993), which discusses what VA may accept as a claim for benefits under section 1151. The Court asked the Board to explain why, in light of the permissive language of § 3.154 and the 1993 letter, Mr. Mansfield was not provided the benefit of the doubt and awarded an effective date earlier than June 11, 1993.

In March 2005, the Board issued the decision now on appeal. The Board determined that as a result of the Court's vacatur of the entire prior decision, the issue on appeal was again whether Mr. Mansfield was entitled to an effective date prior to October 2000. The

Board again concluded that June 11, 1993, was the appropriate effective date for Mr. Mansfield's award of VA benefits. The Board acknowledged that no documents other than the December 1990 Form SF 95 and the October 2000 statement in support of claim were filed by Mr. Mansfield. The Board stated that the first evidence in the record of a claim having been filed by Mr. Mansfield is the June 1993 letter from the Director of Compensation and Pension Services. The Board found that, because this determination was made after the submission of the settlement agreement from the U.S. District Court, "it is clear from the facts and circumstances of the case that, when the Director [of Compensation and Pension Services] determined that a claim meeting the requirements of 38 C.F.R. § 3.154 had been submitted, that determination was not based on the SF 95 transmitting the January 1991 [Federal Tort Claims Act] claim." R. at 11. The Board further concluded that the June 1993 determination that a claim had been filed was discretionary and that the benefit of the doubt rule does not require that VA make a discretionary finding that the criteria for a section 1151 claim were satisfied prior to June 11, 1993. Thus, the Board determined that no regulation entitles Mr. Mansfield to an effective date prior to June 11, 1993.

On appeal, Mr. Mansfield argues that the Board erred in failing to consider whether his submission of an SF 95 constituted an informal or formal claim for benefits pursuant to section 1151. He also argues the VA violated his Fifth Amendment due process rights by failing to adjudicate his claim for VA benefits under section 1151 for almost 10 years.

In response, the Secretary asserts that the Court should affirm the Board's decision because the record supports the Board's conclusion that an effective date prior to June 11, 1993, is not warranted and the decision is supported by adequate reasons or bases. Specifically, the Secretary notes that nothing on the SF 95 indicated an intent to apply for VA benefits. Further, the Secretary argues that because § 3.154 is discretionary, the Court should find that VA properly exercised its discretion in determining that June 11, 1993, is the earliest effective date possible.

II. ANALYSIS

A Board determination of the proper effective date is a finding of fact. *See Hanson v. Brown*, 9 Vet.App. 29, 32 (1996). The Court reviews Board factfinding under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). The Court is required to reverse "a finding of material fact . . . if the finding is clearly erroneous." 38 U.S.C. § 7261(a)(4). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *See id.*

Under 38 U.S.C. § 5110(a), the effective date for an award of compensation benefits is the date of the

receipt of the claim. A formal claim for VA benefits or any statement in a communication showing an intent to file a claim for disability benefits resulting from the pursuit of medical or surgical treatment under VA laws may be accepted as a claim. *See* 38 C.F.R. § 3.154 (1991). Such communication must express an intent to apply for benefits under laws administered by VA. *See* 38 C.F.R. § 3.155 (1991).

In this case, the Board found that there was no evidence in the record of a claim for VA benefits under section 1151 being filed prior to October 2000. Indeed, the record does not reveal any such claim and Mr. Mansfield has acknowledged that he did not file any document with VA prior to October 2000, other than an SF 95 claim pursuant to Federal Tort Claims Act. Contrary to Mr. Mansfield's argument, the Board specifically determined that the submission of an SF 95 was not a formal or informal claim for VA benefits. In support of this finding, the Board noted the difference between a claim under the Federal Tort Claims Act and a claim for VA benefits. The Board then referred to Mr. Mansfield's statement that, when he filed his claim in 1991, he did not know that he could seek VA benefits under section 1151 and the fact that Ms. Mansfield also submitted an SF 95 claim under the Federal Tort Claims Act for loss of consortium, for which she would not be entitled VA benefits. The Board ultimately concluded that, based on a review of the SF 95 submitted in January 1991, Mr. Mansfield was seeking damages pursuant to the Federal Tort Claims Act, not benefits under VA laws and regulations. Because the January 1991 SF 95 does not indicate any intent to seek VA benefits and the record does not reflect any other document showing intent to seek VA benefits prior to October 3, 2000, the

Board's determination that the no document in the record met the requirements to constitute a claim until October 2000 is not clearly erroneous.

Despite this determination, the Board stated that, based on the VA director's June 1993 statement regarding the existence of a claim, "the evidence as to whether a claim was of record in 1993 is in relative equipoise." R. at 7-8. The Board then resolved the benefit of the doubt in favor of the veteran and awarded an effective date of June 11, 1993, the date of the letter from the VA director. As noted above, the proper effective date of an award of VA benefits is the date of receipt of the claim for such benefits. 38 C.F.R. § 3.157(a). In its decision, the Board's assignment of an effective date is not based on the date of receipt of a claim, but is instead based on the date of a letter that mentions a claim for VA benefits. The assignment of this date is additionally confusing as the Board determined that no document in the record could constitute such a claim until October 2000. Based on this finding by the Board, which the Court does not find to be clearly erroneous, the proper effective date for Mr. Mansfield's award of VA benefits is October 3, 2000. However, because any error with respect to the Board's assignment of an effective date of June 11, 1993, actually resulted in a benefit to Mr. Mansfield, the Court may not disturb such a determination. *See* Veterans Benefit Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832 (2002); *see also Roberson v. Principi*, 17 Vet. App. 135, 139 (2003) (per curiam order) (holding that this Court cannot disturb a factual finding that is favorable to the appellant).

Finally, Mr. Mansfield alleges that VA violated his due process rights under the Fifth Amendment of the

U.S. Constitution. However, he does not make any argument regarding this contention in his brief and the Court does not find the mere allegation to be persuasive. *See Brewer v. West*, 11 Vet.App. 228, 236-37 (1998) (holding that the Court will not consider "mere assertions of constitutional impropriety" made without any legal support (citing *Gov't & Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364, 366 (1957))); *see also* U.S. VET. APP. R. 28(a)(5) (requiring that an appellant's brief contain, among other things, "an argument, beginning with a summary and containing the appellant's contentions with respect to the issues and the reasons for those contentions, with citations to the authorities and parts of the record on appeal relied on").

III. CONCLUSION

On consideration of the foregoing, the March 31, 2005, Board decision is AFFIRMED.

DATED: May 16, 2007

APPENDIX C

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

Docket No. 02-00 283

[Dated: March 31, 2005]

IN THE APPEAL OF) SS [REDACTED] 4528
JACK R. MANSFIELD, SR.,)
)

On appeal from the
Department of Veterans Affairs Regional Office
in Detroit, Michigan

THE ISSUE

Entitlement to an effective date prior to October 13, 2000, for an award of VA disability compensation under 38 U.S.C.A. § 1151.

REPRESENTATION

Appellant represented by:
Robert P. Walsh, Attorney at Law

ATTORNEY FOR THE BOARD

Tresa M. Schlecht, Counsel

INTRODUCTION

The veteran had active military service from January 1955 to January 1957. This matter initially came before the Board of Veterans' Appeals (Board) on appeal from an April 2001 rating decision by the Detroit, Michigan, Regional Office (RO) of the Department of Veterans Affairs (VA) which awarded compensation pursuant to the provisions of 38 U.S.C.A. § 1151 for a colostomy due to gall bladder surgery and assigned a 100 percent rating effective October 13, 2000. By a decision issued in October 2002, the Board assigned an effective date of June 11, 1993, but no earlier, for that award.

The veteran appealed that determination to the United States Court of Appeals for Veterans Claims (the Court). In December 2004, the Court issued a decision that vacated the October 2002 Board decision and remanded the appeal. Although the Court vacated the Board's decision, it appears that the Court did not intend to vacate the decision to the extent that it granted an effective date for benefits under 38 U.S.C.A. § 1151 prior to October 13, 2000, but rather, intended only to vacate that portion of the decision which denied an effective date prior to June 11, 1993. In particular, the Court directed that the Board explain why the veteran was not entitled to an effective date earlier than June 11, 1993, in light of the benefit of the doubt doctrine of 38 U.S.C.A. § 5107(b) and the permissive language of 38 C.F.R. § 3.154 discussing what VA may accept as a claim for veterans' benefits in situations involving 38 U.S.C.A. § 1151. However, since the Court's December 2004 Order vacates the Board decision in its entirety, the issue currently before the Board is the grant of an

effective date prior to October 13, 2000 for a grant of benefits under 38 U.S.C.A. § 1151, and assignment of June 11, 2003 as the appropriate effective date for that grant of benefits is restated in the decision below.

This appeal has been advanced on the Board's docket in accordance with 38 C.F.R. § 20.900(c) (2004).

FINDINGS OF FACT

1. All relevant and available evidence necessary for an equitable disposition of the issues addressed in this decision has been obtained, and all statutory duties to the veteran have been met.

2. On January 3, 1991, the VA Regional Counsel received a claim under the Federal Tort Claims Act (FTCA) from the veteran seeking monetary damages for personal injury and a claim from the veteran's wife seeking monetary damages for loss of consortium, alleging that these damages followed the veteran's treatment at a VA Medical Center.

3. The claims submitted on January 3, 1991 were submitted under the FTCA and did not express any intent to claim a benefit governed under veterans' benefits laws.

4. By a memorandum dated May 7, 1993, a Deputy VA General Counsel notified the Director of the VA Compensation and Pension Service that the veteran and his wife had received a compromise settlement of $164,471.22 under the FTCA.

5. By a memorandum issued on June 11, 1993, the Director of the VA Compensation and Pension Service

noted his determination that a claim had been filed which met the requirements under 38 C.F.R. § 3.154 for submission of a claim for benefits under 38 U.S.C.A. § 1151, but the Director did not state when the requirements under 38 C.F.R. § 3.154 were first met.

6. A formal claim for VA benefits for disability resulting from gallbladder surgery and its complications as if such disability were service-connected was received on October 13, 2000.

CONCLUSIONS OF LAW

1. An effective date of June 11, 1993, but no earlier, for an award of VA benefits as if service-connected based on VA medical treatment is warranted. 38 U.S.C.A. §§ 1151, 5103, 5103A, 5110 (West 2002); 38 C.F.R. §§ 3.151, 3.154, 3.160, 3.400(i) (2004).

2. There is no legal entitlement to an effective date prior to June 11, 1993 for an award of VA benefits based on VA medical treatment received in 1989 and thereafter. 38 U.S.C.A. §§ 1151, 5103, 5103A, 5110 (West 1991); 38 C.F.R. §§ 3.150, 3.151, 3.154, 3.155, 3.159, 3.160, 3.400 (2004).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The veteran seeks an effective date prior to October 13, 2000, indeed, prior to June 11, 1993, for an award of VA disability compensation under 38 U.S.C.A. § 1151. Certain facts underlying this claim are not in dispute. The veteran, who had served in the military from January 1955 through January 1957, underwent

gallbladder surgery at the VA Medical Center (VAMC) in Ann Arbor, Michigan, in March 1989. The veteran had numerous postoperative complications following that surgery, including necrotizing pancreatitis and perforation of the duodenum, necessitating numerous surgical procedures, including a permanent colostomy.

On January 3, 1991, the veteran and his wife each filed a SF 95, Claim for Damage or Injury Under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674, with the VA Office of District Counsel, Detroit, Michigan. The veteran claimed damages based on allegations of post-operative complications following the March 1989 surgery performed at a VAMC. The veteran's wife claimed damages for loss of consortium. The SF 95 submitted by the veteran and the SF 95 submitted by the veteran's wife are both devoid of reference to a claim for veterans' compensation or pension benefits or a claim to be adjudicated under laws administered by VA.

In August 1991, the veteran and his wife filed their FTCA claims in the appropriate United States District Court. On February 10, 1993, the veteran and his wife entered into a settlement agreement with the government, resulting to payments to them and their attorney totaling $164,471.22. A U.S. District Court judge signed an Order of Dismissal dismissing the action on February 17, 1993.

In May 1993, a Deputy Assistant General Counsel notified the Director of VA's Compensation and Pension (C&P) Service that the veteran had been awarded a settlement in the amount of $164,471.22 under the FTCA. That memorandum included the veteran's SF 95, the complaint filed with the court in

August 1991, and the February 1993 stipulation of dismissal and Order to Dismiss. The May 1993 memorandum from the Deputy Assistant General Counsel to the Director, C&P Service, did not identify a specific claim filed under U.S.C.A. § 1151 that was pending.

The claims file reflects that, following the receipt of this information from the Office of General Counsel, C&P Service requested the veteran's clinical records. A June 11, 1993 memorandum from the Director, C&P Service, to the Director of the Detroit, Michigan VA Regional Office reflects a determination that "review of the claims folder reveals a claim for benefits has been filed which meets the requirements of 38 C.F.R. § 3.154." The memorandum from the Director, C&P Service, did not state what document or documents was considered as meeting the requirements under 38 C.F.R. § 3.154 for a claim for benefits under 38 U.S.C.A. § 1151, and did not state what date the claim for benefits under 38 U.S.C.A. § 1151 was considered received.

The Director, C&P Service, directed development of the claim for benefits under 38 U.S.C.A. § 1151. However, no further development of a claim for VA benefits was conducted until the veteran submitted an October 2000 formal claim for VA compensation for the disabilities resulting from his 1989 surgery.

Laws and regulations governing the claim for an earlier effective date for benefits

The provisions of 38 U.S.C.A. § 5110 and its implementing VA regulation, 38 C.F.R. § 3.400, govern the assignment of effective dates of VA benefit awards.

The language of 38 U.S.C.A. § 5110 contains the following provisions:

> (a) Unless specifically provided otherwise . . ., the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor. . . .
>
> (c) The effective date of an award of disability compensation by reason of 38 U.S.C.A. § 1151 is the date the injury or aggravation was suffered if the claim is received within one year after that date; otherwise, the effective date is the date of receipt of the claim.

Regulations governing veterans' benefits provide that an application form will be furnished "upon request made in person or in writing by any person applying for benefits under the laws administered by the department of Veterans Affairs . . . ." 38 C.F.R. § 3.150. A specific claim in a form prescribed by the Secretary must be filed in order for benefits to be paid to any individual *under the laws administered by VA.* (Emphasis added.) 38 C.F.R. § 3.151. Any communication or action indicating an intent to apply for one or more benefits *under the laws administered by the Department of Veterans Affairs*, from a claimant, or his or her duly authorized representative, may be considered an informal claim. 38 C.F.R. § 3.155.

Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be

forwarded to the claimant for execution. If [the formal claim] is received within one year from the date it was sent to the claimant, it will be considered filed as the date of the receipt of an informal claim. 38 C.F.R. § 3.155(a).

A formal claim for pension, compensation, dependency and indemnity compensation or any statement in a communication showing an intent to file a claim for disability or for death benefits resulting from the pursuit of a course of vocational rehabilitation, hospitalization, medical or surgical treatment, or examination under Department of Veterans Affairs laws may be accepted as a claim. 38 C.F.R. § 3.154.

Analysis

As discussed in the vacated decision, the determination as to the effective date of the award of compensation under 38 U.S.C.A. § 1151 is controlled by the date of receipt of the original claim for benefits under that section. The RO has implicitly found that the informal claim received on October 13, 2000, constituted the earliest, indeed the only, claim of record that meets the requirements of 38 C.F.R. § 3.154, the critical element of which is that there be an expression of intent to file a claim for benefits based on VA medical treatment.

No document received from the veteran before October 13, 2000, and meeting the requirements of that section is now of record in the claims file, but the June 1993 memorandum from the Director of the VA Compensation and Pension Service contains an explicit reference to a claim that was said to be in the file at that time. The reference cannot be casually dismissed

as an error since it is found in a document that is not a form letter but was individually drafted to reflect the circumstances of the veteran's case. The memorandum directs that a specific course of action be undertaken in response to the filing of such a claim, namely, that the veteran's entitlement to benefits under § 1151 be developed and adjudicated.

The evidence as to whether such a claim was filed before June 1993 is ambiguous given that a claim document is not of record, that the file contains no other reference to such a document, and that the veteran himself has not alleged that he ever filed a disability claim before October 2000 other than the December 1990 SF-95, received by VA in January 1991. In the absence of any means for reconciling the conflict, the Board must find that the evidence of record with respect to the question of whether a claim was in fact of record in June 1993 is in relative equipoise and that the benefit of the doubt must be resolved in favor of the veteran. *Alemany v. Brown*, 9 Vet. App. 518, 519 (1996).

This finding is consistent with judicial precedent establishing a presumption of regularity under which it is presumed that government officials, in this case the Director of the VA Compensation and Pension Service in preparing the memorandum, "have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *Mindenhall v. Brown*, 7 Vet. App. 271 (1994). The presumption that there has been regularity in the administrative process may be rebutted only by "clear evidence to the contrary." *Schoolman v. West*, 12 Vet. App. 307, 311 (1999); *Ashley v. Derwinski*, 2 Vet. App. 307 (1992). Accordingly, in the absence of clear and

unmistakable evidence that a document meeting the requirements of 38 C.F.R. § 3.154 was not of record at the time of the June 11, 1993, memorandum, the Board accepts such memorandum as the earliest evidence of the filing of a claim for compensation under 38 U.S.C.A. § 1151 and assigns that date as the effective date of the later award under that section.

The veteran contends that the § 1151 compensation award should extend all the way back to March 1989, the date of his original hospitalization for gallbladder surgery, on the basis of his submission of the December 1990 application for damages under the FTCA. In determining whether the December 1990 Form SF 95 may be recognized as a claim for compensation, fundamental differences between a claim for VA compensation and a claim under the FTCA must be taken into account. The law makes a clear distinction between the two types of claims.

The FTCA prescribes a uniform procedure for the handling of claims against the Government on account of damage to or loss of property, personal injury or death caused by negligent or wrongful acts or omission of a Government employee under circumstances where the United States, if a private person, would be liable under the law. 28 U.S.C.A. 1291, 1346, 1402, 2401, 2402, 2411, 2412, and 2671 through 2680; 38 C.F.R. § 14.600 (2001). A claim under the FTCA is initiated by the filing of a Form SF 95, Claim for Damages, Injury, or Death. That is the form prescribed by regulation to be used in a FTCA action. See 38 C.F.R. § 14.604 (2004).

The FTCA, including 28 U.S.C.A. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, and 2671-2680, is a statute

which waives the sovereign immunity of the federal government. That statute provides a uniform procedure for handling claims against the government under a variety of circumstances where the United States, if a private person, would be liable under the law.

The regulations governing claims for veterans' benefits provide that any communication showing an intent to file a claim for disability or for death benefits resulting from VA hospitalization, medical or surgical treatment under Department of Veterans Affairs laws **may** be accepted as a claim for benefits under 38 U.S.C.A. § 1151. However, in this case, the Regional Counsel did not interpret the veteran's FTCA claim, or the claim of the veteran's wife, as a claim under 38 U.S.C.A. § 1151.

The form which the veteran and his wife used to submit their FTCA claims in January 3, 1991, the SF 95, is a standard United States Government form that may be used to submit an FTCA claim to *any* agency of the federal government. The SF 95 is not a VA form. Block 1 of the SF 95 requires the claimant to specify the federal agency to which the claim is to be submitted. In the facts underlying this appeal, the veteran and his wife stated that the forms were to be submitted to the Veterans Administration.

The FTCA is not among the laws governing veterans' benefits, and is not administered by VA, and VA regulations so state. *See* 38 C.F.R. §§ 14.600-14.614. Although certain authority is delegated to specific employees of VA to act with regard to FTCA claims and FTCA matters, the VA regulations setting forth those delegations make it clear that the VA employees

are acting under regulations issued by the Department of Justice in Title 28, Code of Federal Regulations, when handling with FTCA matters. The liability of the Federal Government in FTCA claims is determined in accordance with the law of the state where the act or omission bringing rise to the FTCA claim occurred.

In particular, although 38 C.F.R. § 3.154 does not specifically so state, as noted above, in order to constitute a claim for veterans' benefits, as defined at 38 C.F.R. § 3.155, a communication must express an intent to apply for benefits *under laws administered by VA*. A claim for damages under the FTCA is not a claim for disability or death benefits under laws administered by VA. The FTCA claims submitted by the veteran and his wife in January 1991 expressed no intent to seek any benefit other than under the FTCA.

Thus, to the extent that a claim for benefits under 38 U.S.C.A. § 1151 requires an intent to submit a claim under laws administered by VA, the veteran's 1991 FTCA submission does not meet that requirement.

The Court, in a related context construing 38 C.F.R. § 3.151 (providing that a claim for compensation may be considered to be a claim for pension and vice versa), held, in *Stewart v. Brown*, 10 Vet. App. 15, 18 (1997), that VA was not obligated to accept a veteran's application for pension as a claim for service connection for post-traumatic stress disorder, stating that "[t]he Secretary is not automatically required to treat every compensation claim as also being a pension claim or vice versa." The Court indicated that the use of the word "may" in § 3.151 gave the Secretary discretion to determine the nature of a given claim.

Under this analysis, VA would appear to have similar discretion in interpreting 38 C.F.R. § 3.154.

The fact that the Regional Counsel did not interpret the veteran's January 1991 FTCA claim as also being a claim for veterans' benefits under 38 U.S.C.A. § 1151 is consistent with the veteran's statement that he did not know he could apply for VA benefits for the facts surrounding the FTCA claim. Moreover, the fact that the veteran's wife also submitted an FTCA claim at the same time for damages for loss of consortium, which is not compensable under laws governing veterans' benefits, made it even clearer that the veteran was seeking benefits other than veterans' benefits under laws administered by VA

Neither the veteran's January 3, 1991 claim for monetary damages under the FTCA nor the January 3, 1991 claim for monetary damages under the FTCA submitted by the veteran's wife contained an expression of intent to apply for VA compensation or constituted a claim for benefits administered by VA, and those claims were not, in and of themselves, a claim for benefits under 38 U.S.C.A. § 1151. 28 U.S.C. § 2674, 38 U.S.C.A. § 1151 (West 2002); 38 C.F.R. §§ 14.500, 14.600-617 (2004); 38 C.F.R. §§ 3.150, 3.154, 3.155 (1991).

The file before the Director, C&P service, when he made the June 1993 determination that a claim for benefits had been filed which met the requirements of 38 CFR § 3.154, included documents other than the FTCA claims filed by the veteran and his wife in January 1991. The additional documents, particularly the complaint filed before the United States District Court, contain facts not included in the initial FTCA

claim submitted in January 1991. Thus, it is clear from the facts and circumstances of the case that, when the Director, C&P Service, determined that a claim meeting the requirements of 38 C.F.R. § 3.154 had been submitted, that determination was not based on the SF 95 transmitting the January 1991 FTCA claim. The governing statutory and regulatory provisions do not require the Board to find that the requirements were met prior to the date of the determination by the Director, C&P Service, and the Board declines to do so.

As the Court noted in its December 2004 Order, a determination under 38 C.F.R. § 3.154 as to whether a communication of some type expresses an intent to file a claim under 38 U.S.C.A. § 1151 is permissive, or discretionary, when the communication is other than a normal claim specifically referencing such benefits. *See Malone v. Gober*, 10 Vet. App. 539, 544 (1997) (discussing care that Secretary "may" provide, as opposed to "shall" provide, as being left to his discretion).

In this case, VA made a discretionary determination on June 11, 1993, that an informal claim for benefits under 38 U.S.C.A. § 1151 had been submitted. The benefit-of-the doubt provisions of 38 U.S.C.A. § 5107(b) are not applicable to require the Secretary to make a discretionary determination that the criteria for a claim for benefits under 38 U.S.C.A. § 1151 were satisfied prior to June 11, 1993. *Compare* 38 C.F.R. § 3.153 ("An application on a form jointly prescribed by [VA] and [the Secretary of Health and Human Services] filed with the Social Security Administration (SSA) . . . *will* be considered a claim for death benefits, and to have been received [by VA] as of the date of

receipt in SSA . . . .") with 38 U.S.C.A. § 3.154 ("A formal claim [for veterans' benefits] . . . or any statement in a communication showing an intent to file a claim for disability or for death benefits resulting from . . . hospitalization, medical or surgical treatment, or examination under Department of Veterans Affairs laws may be accepted as a claim [for benefits under 38 U.S.C.A. § 1151.")

A permissive, or discretionary, regulation is exactly that, discretionary. The Director, C&P Service, did not indicate that the criteria for submission of a claim for benefits under 38 U.S.C.A. § 1511 were met until he assembled the evidence, including the materials provided as part of the FTCA action; there is no evidence that the criteria were, in fact, met prior to June 11, 1993.

The regulatory provision which allowed VA to determine in June 1993 that an informal claim for such benefits was submitted as of June 11, 1993 does not require VA to determine that a date prior to June 11, 1993 is appropriate for the grant of benefits under 38 U.S.C.A. § 1151 at issue in this case. No statutory or regulatory provision entitles the veteran to an effective date prior to June 11, 1993, for an award of benefits under 38 U.S.C.A. § 1151. An effective date of June 11, 1993, for the grant of benefits under 38 U.S.C.A. § 1151, but no earlier date, is granted.

ORDER

An effective date of June 11, 1993, is granted for an award of veterans' benefits under 38 U.S.C.A. § 1151; the veteran's appeal for an effective date prior to October 13, 2000, for the award of benefits under 38

U.S.C.A. § 1151 is granted to this extent only, subject to the criteria governing the payment of monetary awards.

BARBARA B. COPELAND
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the Court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the United States Court of Appeals for Veterans Claims. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. *As long* as *you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to Court is filed on time.*

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals
for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's web site on the Internet at **www.vetapp.uscourts.gov,** and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I tile a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA stating why you believe that the BVA committed an obvious error of fact or law in this decision, or stating that new and material military service records have been discovered that apply to your appeal. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Send your letter to:

Director, Management
and Administration (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management and Administration, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is

based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management and Administration, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: **www.va.gov/vso**. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information is also provided on the Court's website at **www.vetapp.uscourts.gov**.

Do I have to pay an attorney or agent to represent me? Except for a claim involving a home or small business VA loan under Chapter 37 of title 38, United States Code, attorneys or agents cannot charge you a fee or accept payment for services they provide ***before*** the date BVA makes a final decision on your appeal. If you hire an attorney or accredited agent ***within 1 year*** of a final BVA decision, then the attorney or agent is allowed to charge you a fee for representing you before VA in most situations. An attorney can also charge you for representing you before the Court. VA cannot pay fees of attorneys or agents.

Fee for VA home and small business loan eases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. For more information, read section 5904, title 38, United States Code.

In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to:

Office of the
Senior Deputy Vice Chairman (012)
Board of Veterans' Appeals

810 Vermont Avenue, NW
Washington, DC 20420

The Board may decide, on its own, to review a fee agreement for reasonableness, or you or your attorney or agent can file a motion asking the Board to do so. Send such a motion to the address above for the Office of the Senior Deputy Vice Chairman at the Board.

VA Form 4597
JUN 2003 (RS)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 02-2230

[Dated: December 2, 2004]

JACK R. MANSFIELD, SR.,
APPELLANT,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,
APPELLEE.

Before GREENE, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Veteran Jack R. Mansfield appeals, through counsel, an October 29, 2002, decision by the Board of Veterans' Appeals (Board) that found that he was not entitled to an effective date earlier than June 11, 1993, for an award of VA disability compensation under 38 U.S.C. § 1151. Mr. Mansfield contends that his January 1991 claim under the Federal Torts Claims

Act (FTCA) for complications from surgery performed on him at a VA medical center constituted an informal claim for VA compensation and thus the effective date for the award should be January 3, 1991.

The Secretary contends that, after reviewing Mr. Mansfield's claim, the Board determined that the effective date should have been earlier than the originally assigned date of October 13, 2000, because the VA Director of Compensation and Pension (Director of C&P), in June 1993, recognized that Mr. Mansfield had filed a claim for VA benefits. The Secretary maintains that VA's further development of the claim and assignment of the June 1993 effective date has a plausible basis and thus is not clearly erroneous. He argues that Mr. Mansfield's claim under the FTCA does not constitute an informal claim and, therefore, the Board decision should be affirmed. Single-judge disposition is appropriate when, as here, the issues are of relative simplicity and the outcome is not reasonably debatable. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). The matter will be remanded for the following reasons.

Mr. Mansfield served in the U.S. Army from January 1955 until January 1957. Record (R.) at 42. In March 1989, he underwent gall bladder surgery at the VA medical center in Ann Arbor, Michigan, which resulted in postoperative complications. R. at 101-52. On January 3, 1991, he filed with VA on VA Form SF-95, a claim under the FTCA seeking compensation for these complications and was awarded a settlement. R. at 79-96. In June 1993, the Detroit, Michigan, VA Regional Office (RO) received notice from the Director of C&P that Mr. Mansfield had received a settlement under the FTCA. R. at 208. The notice stated that such

settlement did not represent an admission of negligence by VA, and that when an FTCA claim is settled and a claim for VA benefits is also filed based on the same disability or death, any VA award of benefits under 38 U.S.C. § 1151 is subject to offset under 38 C.F.R. § 3.800(a)(2). *Id.* The Director of C&P also stated that review of the claims file "reveals a claim for benefits has been filed which meets the requirements of 38 C.F.R. § 3.154," that the RO should develop and adjudicate that claim, and that any benefits payable will be subject to offset. *Id.*

The record on appeal does not demonstrate any development of the claim from 1993 to 2000. In October 2000, Mr. Mansfield filed a formal claim for VA compensation for the disabilities resulting from his 1989 surgery. R. at 97. His claim was adjudicated and his condition was considered service connected, effective October 2000–the date he filed the claim. R. at 210-15. Mr. Mansfield disagreed with the assigned effective date and argued that his FTCA claim constituted an informal claim for VA benefits and that the assigned effective date should be January 1991, the date that he filed the SF-95. R. at 219.

In the decision here on appeal, the Board stated that the record on appeal contains no evidence of a claim for VA benefits having been filed prior to 2000, nor has Mr. Mansfield identified any claim filed by him prior to 2000, other than his January 1991 SF-95 form. R. at 8. The Board noted, however, that the 1993 letter from the Director of C&P to the RO contained an "explicit reference" to an informal claim in the record at that time. *Id.* The Board concluded that "in the absence of any means for reconciling the conflict," it would apply the benefit of the doubt and accept the

Director of C&P's June 1993 letter as "the earliest evidence of the filing of a claim" for VA benefits, and assign that date as the effective date for his award. R. at 8-9. In declining to recognize the 1991 SF-95 as a claim for VA compensation, the Board highlighted the differences between an FTCA claim and a claim for VA disability compensation. R. at 9-10. The Board concluded:

> Consistent with the basic differences between a[n FTCA claim] and a VA compensation or pension claim, there is no statutory provision or VA regulation that authorizes the acceptance of a[n] SF-95 tort claim *per se* as either a formal or informal application for compensation under § 1151. Furthermore, there is nothing in the record to suggest that the Form SF-95 filed in [January 1991] was submitted by the veteran as a claim for any VA benefit. Therefore, in order for the Form SF-95 to warrant recognition as a § 1151 claim, it would have to satisfy the requirement of 38 C.F.R. § 3.154 that it contain an expression of intent to apply for such benefit. The assertions set forth therein amount in essence to allegations of VA malpractice in treating the veteran during hospitalizations in 1989. These allegations are entirely consistent with a tort claim, for which the use of the form was prescribed. Nothing therein states or implies that VA compensation was being sought in addition to tort damages. In the absence of such a statement, the form may not be accepted as an informal claim for VA compensation. *See also* 38 C.F.R. §§ 3.151, 3.155 (2001).

R. at 10-11.

The Board's determination of the proper effective date is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996); *Scott v. Brown*, 7 Vet.App. 184, 188 (1994); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). Under this standard, the Court may not substitute its judgment for that of the Board, and can overturn the Board's factual determinations only when there is no plausible basis in the record for them. *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997); *Gilbert, supra*. In its decision the Board must also "account for the evidence which it finds to be persuasive or unpersuasive" and provide reasons or bases for rejecting material evidence favorable to the veteran. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review by this Court. *See Allday, supra*; *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992); *Gilbert, supra*.

Under 38 U.S.C. § 1151, VA benefits may be paid to a veteran who suffered an injury as a result of VA medical treatment. Although this provision of title 38 has undergone revision since Mr. Mansfield's original FTCA claim submission to VA in 1991, these changes are not relevant to this matter. *Compare* 38 U.S.C. § 1151 (1990) *and* (2004); *see also Brown v. Gardner*, 513 U.S. 115 (1994). The effective date of an award of disability compensation awarded pursuant to section 1151 shall be the date the injury or aggravation was suffered if a claim is received by VA within one year after that date; otherwise, the effective date shall be the date of receipt of the claim. 38 U.S.C. § 5110(c); 38 C.F.R. § 3.400(i)(1) (2004). "When there

is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

Under 38 C.F.R. § 3.154 (titled "Injury due to hospital treatment, etc."):

> A formal claim for pension, compensation, dependency and indemnity compensation or any statement in a communication showing an intent to file a claim for disability or for death benefits resulting from the pursuit of a course of vocational rehabilitation, hospitalization, medical or surgical treatment, or examination under Department of Veterans Affairs laws *may be* accepted as a claim.

38 C.F.R. § 3.154 (2004) (emphasis added) This provision has remained unchanged since 1962 and was in force in 1993 when the Director of C&P sent his notification to the RO that Mr. Mansfield's file contained a claim for VA benefits under § 3.154. The Board stated that "there is no statutory provision or VA regulation that authorizes the acceptance of a[n] SF-95 tort claim *per se* as either a formal or informal application for compensation under § 1151." R. at 10. The Board then stated that "nothing in the record" suggests that the SF-95 form was intended as a claim for VA benefits. *Id.* The Board failed, however, to explain how it could conclude that *nothing* in the record demonstrated that the SF-95 was intended to be a claim for benefits, and *nothing* of record prior to 2000 constituted a claim for VA benefits "that meets the requirements of 38 C.F.R. § 3.154"(R. at 8), when the

Director of C&P's 1993 letter obviously referred to *something* already in Mr. Mansfield's file that he considered to constitute a claim for VA benefits. The Board's explanation of its decision to assign June 1993 as the effective date for Mr. Mansfield's claim is further inadequate to satisfy 38 U.S.C. § 7104(d)(1), considering the permissive language of § 3.154 (discussing what VA *may* accept as a claim for benefits in § 1151-type situations): The Board has not sufficiently explained why, in light of the benefit of the doubt doctrine, the permissive language of § 3.154, and the Director of C&P's June 1993 letter, Mr. Mansfield is not entitled to an effective date earlier than June 1993. Accordingly, the Board's decision must be vacated and the matter remanded for readjudication and a decision supported by adequate reasoning. *See* 38 U.S.C. § 5107(b); *Allday* and *Gilbert*, both *supra*.

Upon consideration of the foregoing, it is

ORDERED that the October 29, 2002, Board decision is VACATED and the matter is REMANDED.

DATED: December 2, 2004

BY THE COURT:

WILLIAM P. GREENE, JR.
Judge

APPENDIX E

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

Docket No. 02-00 283

[Dated: October 29, 2002]

IN THE APPEAL OF JACK R. MANSFIELD	) SS [REDACTED] 4528))

On appeal from the
Department of Veterans Affairs Regional Office
in Detroit, Michigan

THE ISSUE

Entitlement to an effective date earlier than October 13, 2000, for an award of compensation pursuant to the provisions of 38 U.S.C.A. § 1151 (West 1991 & Supp. 2002).

ATTORNEY FOR THE BOARD

R. L. Shaw, Counsel

INTRODUCTION

The veteran had active military service from January 1955 to January 1957.

This matter is before the Board of Veterans' Appeals (Board) on appeal from an April 2001 rating decision by the Detroit, Michigan, Regional Office (RO) of the Department of Veterans Affairs (VA) which awarded compensation pursuant to the provisions of 38 U.S.C.A. § 1151 for a colostomy due to gall bladder surgery and assigned a 100 percent rating effective October 13, 2000. The veteran has appealed the effective date of the award.

FINDINGS OF FACT

1. The veteran underwent gallbladder removal at a VA hospital in March 1989; postoperative complications necessitated numerous subsequent surgical procedures.

2. In December 1990 the veteran submitted a claim to VA under the Federal Tort Claims Act for monetary damages based on disability claimed to have resulted from VA treatment; he subsequently filed a tort action against the Government in a United States District Court.

3. The veteran's December 1990 claim for monetary damages under the Federal Tort Claims Act, Form SF-95, did not contain an expression of intent to apply for VA compensation.

4. The VA General Counsel notified the Director of the VA Compensation and Pension Service in May 1993 that the veteran had been awarded damages in the amount of $164,471.22 pursuant to a settlement of the veteran's action against the Government.

5. The Director of the VA Compensation and Pension Service notified the Director of the RO on June 11, 1993, that the veteran's tort claim had been settled and that a claim satisfying the requirements of 38 C.F.R. § 3.154 was on file.

6. A claim for VA compensation for disability resulting from gallbladder surgery and its complications was received on October 13, 2000.

7. By a rating decision of April 2001, the RO found the veteran entitled to compensation under the provisions of 38 U.S.C.A. § 1151 for a colostomy secondary to VA surgery and assigned a 40 percent rating effective October 13, 2000.

CONCLUSIONS OF LAW

1. An effective date of June 11, 1993, for an award of VA disability compensation based on VA medical treatment is warranted. 38 U.S.C.A. §§ 1151, 5110 (West 1991 & Supp. 2002); 38 C.F.R. §§ 3.151, 3.154, 3.160, 3.400(i) (2001).

2. The veteran's December 1990 claim for monetary damages under the Federal Tort Claims Act did not constitute a claim for benefits under 38 U.S.C.A. § 1151. 28 U.S.C. § 2674; 38 U.S.C.A. § 1151; 38 C.F.R. § 14.500, 14.600-617 (2001).

3. An effective date of June 11, 1993, but no earlier, for an award of VA disability compensation based on VA medical treatment is warranted. 38 U.S.C.A. §§ 1151, 5110 (West 1991 & Supp. 2002); 38 C.F.R. §§ 3.151, 3.154, 3 155, 3.160, 3.400(i) (2001).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Preliminary matter -- the VCAA

The Board has given consideration to the provisions of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000) [codified as amended at 38 U.S.C.A. § 5100 *et seq.* (West 2001)]. The VCAA includes an enhanced duty to notify a claimant as to the information and evidence necessary to substantiate a claim for VA benefits. This law also redefines the obligations of VA with respect to the duty to assist. Regulations implementing the VCAA have been enacted. *See* 66 Fed. Reg. 45, 620 (August 29, 2001) (codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a)).

The VCAA is applicable to all claims filed on or after the date of enactment, November 9, 2000, or filed before the date of enactment and not yet final as of that date. Except for provisions pertaining to claims to reopen based upon the submission of new and material evidence, which do not apply in this case, the implementing regulations are also effective November 9, 2000. In this case, the regulations are thus applicable. *See Holliday v. Principi*, 14 Vet. App. 280 (2001) (the Board must make a determination as to the applicability of the various provisions of the VCAA to a particular claim).

The VCAA requires VA to notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence not previously provided to VA that is necessary to substantiate the claim. As part of the notice, VA is to specifically inform

the claimant and the claimant's representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant. 38 U.S.C.A. § 5103 (West Supp. 2002). *See Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002). The VCAA also requires that VA make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claim, unless no reasonable possibility exists that such assistance would aid in substantiating the claim.

In the present case, however, it is the law rather than the factual evidence that is dispositive of the issue on appeal. The issue before the Board is legal rather than medical, and its outcome will be determined by the interpretation and application of the law and regulations regarding the effective dates of monetary awards. The United States Court of Appeals for Veterans Claims (the Court) has held that the VCAA does not affect matters on appeal when the question is limited to statutory interpretation. *See generally Dela Cruz v. Principi*, 15 Vet. App. 143 (2001). *Smith v. Gober*, 14 Vet. App. 227, 231-32 (2000); *see also Livesay v. Principi*, 15 Vet. App. 165 (2001) (en banc) (holding that the VCAA is not applicable where it could not affect a pending matter and could have no application as a matter of law).

Consequently, the notice and duty to assist provisions of the VCAA are not applicable to the present appeal.

Factual Background

VA medical records show that in March 1989 the veteran underwent a cholecystectomy which was

complicated by necrotizing pancreatitis and perforation of the duodenum, necessitating numerous surgical procedures, including a permanent colostomy.

On December 28, 1990, the veteran filed a SF 95, Claim for Damage or Injury Under the Federal Tort Claims Act, 28 U.S.C. § 2674, wherein he sought damages in the amount of $500,000 for personal injury consisting of "[p]ermanent and significant pain; diarrhea; passing of blood in urine; significant localized pain in the area of the low back to penis on the right side; limitation of activity including walking; requires wheelchair assistance; difficulty driving; ongoing digestive problems" due to VA medical care since March 1989. In July 1991 the veteran filed a civil action against the Government in the United States District Court for the Eastern District of Michigan seeking damages in the same amount.

By a memorandum date-stamped in May 1993, the VA Deputy Assistant General Counsel notified the Director of the VA Compensation and Pension Service that the veteran's claim under the Federal Tort Claim Act had been settled and that $164,471.22 had been paid to the veteran pursuant to the settlement.

By a memorandum dated June 11, 1993, the Director of the VA Compensation and Pension Service notified the Director of the Detroit VA Regional Office of the settlement of the tort claim. The memorandum contained the following language:

> Review of the claims folder reveals a claim for benefits has been filed which meets the requirements of 38 C.F.R. § 3.154. Accordingly, development should be undertaken in

> accordance with M21-1, part IV, [paragraph] 22.03 et seq. Upon completion of the required development, the material received, together with the claims folder, should be referred to the rating board for a decision as to entitlement to benefits under 38 U.S.C. § 1151. If the decision is favorable, benefits payable will be subject to offset as [under 38 C.F.R. § 3.800 (a)(2)] as explained above.

On October 13, 2000, the RO received an informal claim from the veteran for "service connection" for his 1989 gallbladder surgery at a VA hospital which resulted in his having to wear a colostomy bag. By an April 2001 rating decision, compensation was awarded under § 1151 for a colostomy secondary to gallbladder surgery. A 100 percent schedular rating was assigned and the award was made effective from October 13, 2000.

The RO notified the veteran on May 15, 2001, that compensation had been awarded under 38 U.S.C.A. § 1151 with a payment start date of November 1, 2000. The letter advised that the total amount of the benefits awarded would be withheld until an amount equal to the [settlement] amount of $164,471.22 had been recouped.

Legal criteria

The provisions of 38 U.S.C.A. § 5110 and its implementing VA regulation, 38 C.F.R. § 3.400 (2001), govern the assignment of effective dates of VA benefit awards. The language of § 5110(a) contains the following general provision:

> Unless specifically provided otherwise..., the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase of compensation...shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

The effective date of an award of disability compensation by reason of 38 U.S.C.A. § 1151 is the date the injury or aggravation was suffered if the claim is received within one year after that date; otherwise, the effective date is the date of receipt of the claim. 38 U.S.C.A. § 5110(c) (West 1991 & Supp. 2002); 38 C.F.R. § 3.400(i) (2001).

Payment of compensation may not be made to an individual for any period before the first day of the calendar month following the month in which the award became effective. 38 U.S.C.A. § 5111 (West 1991).

In order for benefits to be paid or furnished to any individual under the laws administered by the Secretary, the law requires that a specific claim in the form prescribed by the Secretary must be filed. 38 U.S.C.A. § 5101(a) (West 1991); 38 C.F.R. § 3.151(a) (2001). Upon request made in person or in writing, the Secretary shall furnish, free of expense, all such printed instructions and forms as may be necessary in establishing the claim. 38 U.S.C.A. § 5102 (West 1991 & Supp. 2002).

Any communication or action indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans

Affairs...may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If [the formal claim] is received within one year from the date it was sent to the claimant, it will be considered filed as the date of the receipt of an informal claim. 38 C.F.R. § 3.155(a) (2001). A claim "means a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit," *Brannon v. West*, 12 Vet. App. 32 (1998); 38 C.F.R. § 3.1(p) (2001).

A formal claim for pension, compensation, dependency and indemnity compensation or any statement in a communication showing an intent to file a claim for disability or for death benefits resulting from the pursuit of vocational rehabilitation, hospitalization, medical or surgical treatment or examination under VA laws may be accepted as a claim. 38 C.F.R. § 3.154 (2002). (Authority 38 U.S.C.A. § 1151).

When disability or death is due to VA hospital treatment, training, medical or surgical treatment, or examination, a specific application for benefits will not be initiated. 38 C.F.R. § 3.150(c) (2001).

Discussion

The determination as to the effective date of the award of compensation under 38 U.S.C.A. § 1151 is controlled by the date of receipt of the original claim for benefits under that section. The RO has implicitly found that the informal claim received on October 13, 2000, constituted the earliest, indeed the only, claim of

record that meets the requirements of 38 C.F.R. § 3.154, the critical element of which is that there be an expression of intent to file a claim for benefits based on VA medical treatment. No document received from the veteran before October 13, 2000, and meeting the requirements of that section is now of record in the claims file, but the June 1993 memorandum from the Director of the VA Compensation and Pension Service contains an explicit reference to a claim that was said to be in the file at that time. The reference cannot be casually dismissed as an error since it is found in a document that is not a form letter but was individually drafted to reflect the circumstances of the veteran's case. The memorandum directs that a specific course of action be undertaken in response to the filing of such a claim, namely, that the veteran's entitlement to benefits under § 1151 be developed and adjudicated.

The evidence as to whether such a claim was filed before June 1993 is ambiguous given that the document is not of record, that the file contains no other reference to such a document, and that the veteran himself has not alleged that he ever filed a disability claim before October 2000 other than the December 1990 SF-95 tort claim. In the absence of any means for reconciling the conflict, the Board must find that the evidence of record with respect to the question of whether a claim was in fact of record in June 1993 is in relative equipoise and that the benefit of the doubt must be resolved in favor of the veteran. *Alemany v. Brown*, 9 Vet. App. 518, 519 (1996). This finding is consistent with judicial precedent establishing a presumption of regularity under which it is presumed that government officials, in this case the Director of the VA Compensation and Pension Service in preparing the memorandum, "have properly

discharged their official duties." *United States v. Chemical Foundation*, Inc., 272 U.S. 1, 14-15 (1926); *Mindenhall v. Brown*, 7 Vet. App. 271 (1994). The presumption that there has been regularity in the administrative process may be rebutted only by "clear evidence to the contrary." *Schoolman v. West*, 12 Vet. App. 307, 311 (1999); *Ashley v. Derwinski*, 2 Vet. App. 307 (1992). Accordingly, in the absence of clear and unmistakable evidence that a document meeting the requirements of 38 C.F.R. § 3.154 was not of record at the time of the June 11, 1993, memorandum, the Board accepts such memorandum as the earliest evidence of the filing of a claim for compensation under 38 U.S.C.A. § 1151 and assigns that date as the effective date of the later award under that section.

The veteran contends that the § 1151 compensation award should extend all the way back to March 1989, the date of his original hospitalization for gallbladder surgery, on the basis of his submission of the December 1990 application for damages under the Federal Tort Claims Act. In determining whether the December 1990 Form SF 95 may be recognized as a claim for compensation, fundamental differences between a claim for VA compensation and a claim under the Federal Tort Claims Act must be taken into account. The law makes a clear distinction between the two types of claims.

The Federal Tort Claims Act prescribes a uniform procedure for the handling of claims against the Government on account of damage to or loss of property, personal injury or death caused by negligent or wrongful acts or omission of a Government employee under circumstances where the United States, if a private person, would be liable under the

law. 28 U.S.C.A. 1291, 1346, 1402, 2401, 2402, 2411, 2412, and 2671 through 2680; 38 C.F.R. § 14.600 (2001). A claim under the Federal Tort Claims Act is initiated by the filing of a Form SF 95, Claim for Damages, Injury, or Death. That is the form prescribed by regulation to be used in a Federal Tort Claims Act. *See* 38 C.F.R. § 14.604 (2001).

Federal Tort Claims Act claims are filed pursuant to Title 28 of the United States Code and are claims against the United States Government, not VA specifically. The VA General Counsel and Regional Counsels have the responsibility of representing the VA in litigation of these claims. *See* 38 C.F.R. § 14.500 (the General Counsel is responsible to the Secretary for *inter alia*, all litigation arising in, or out of, the activities of the Department of Veterans Affairs or involving any employee thereof in his or her official capacity), §§ 14.600 to 14.617. The General Counsel may delegate or assign any matter within its jurisdiction to the Regional Counsels. 38 C.F.R. § 14.501. Unlike claims for VA benefits under 38 U.S.C.A. § 1151 or any other section, claims under the Federal Tort Claims Act are adversarial in nature. Negligence questions arising in tort claims may arise from any aspect of VA operations. Many of these would be unrelated to the payment of benefits, automobile accidents or falls on VA property being common examples. Claims under § 1151 involve issues of carelessness, negligence, etc., arising only from VA medical care or vocational rehabilitation.

By contrast, claims for VA disability compensation and pension, including benefits awarded under § 1151 for disability resulting from VA treatment, are governed by Title 38 of the United States Code. Section 511(a)

authorizes the Secretary to "decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits to veterans or the dependents or survivors of veterans."

Consistent with the basic differences between a Federal Torts Act Claim and a VA compensation or pension claim, there is no statutory provision or VA regulation that authorizes the acceptance of a SF-95 tort claim *per se* as either a formal or informal application for compensation under § 1151. Furthermore, there is nothing in the record to suggest that the Form SF-95 filed in December 1990 was submitted by the veteran as a claim for any VA benefit. Therefore, in order for the Form SF-95 to warrant recognition as a § 1151 claim, it would have to satisfy the requirement of 38 C.F.R. § 3.154 that it contain an expression of intent to apply for such benefit. The assertions set forth therein amount in essence to allegations of VA malpractice in treating the veteran during hospitalizations in 1989. These allegations are entirely consistent with a tort claim, for which the use of the form was prescribed. Nothing therein states or implies that VA compensation was being sought in addition to tort damages. In the absence of such a statement, the form may not be accepted as an informal claim for VA compensation. *See also* 38 C.F.R. §§ 3.151, 3.155 (2001).

Accordingly, while the Board is able to find that a proper legal and factual basis exists for the acceptance of the June 11, 1993, memorandum as an application for compensation under 38 U.S.C.A. § 1151, no earlier date may be assigned since the December 1990 Federal Tort Claims Act claim did not satisfy the requirements for recognition as a § 1151 claim.

ORDER

An effective date of June 11, 1993, but no earlier, for an award of disability compensation under the provisions of 38 U.S.C.A. § 1151 is granted and the appeal is allowed to that extent, subject to the criteria governing the payment of monetary awards.

/s/ Barbara B. Copeland
BARBARA B. COPELAND
Member, Board of Veterans' Appeals

IMPORTANT NOTICE: We have attached a VA Form 4597 that tells you what steps you can take if you disagree with our decision. We are in the process of updating the form to reflect changes in the law effective on December 27, 2001. *See* the Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (2001). In the meanwhile, please note these important corrections to the advice in the form:

- These changes apply to the section entitled "Appeal to the United States Court of Appeals for Veterans Claims." (1) A "Notice of Disagreement filed on or after November 18, 1988" is no longer required to appeal to the Court. (2) You are no longer required to file a copy of your Notice of Appeal with VA's General Counsel.

- In the section entitled "Representation before VA," filing a "Notice of Disagreement with respect to the claim on or after November 18, 1988" is no longer a condition

for an attorney-at-law or a VA accredited agent to charge

- you a fee for representing you.

Department of Veterans Affairs

APPEALS NOTICE: A copy of the Board of Veterans' Appeals (BVA) decision in your appeal accompanies this notice. This is the final decision for all issues either allowed, denied, or dismissed by the BVA in the "Order" section of the decision. A "remand" section may follow the "Order," but a remand is not a final decision. *The advice below only applies to issues that were allowed, denied, or dismissed in the "Order."*

You need do nothing further if you are satisfied with the outcome of your appeal. We will return your file to your local VA office to implement the BVA's decision. If you are not satisfied with the BVA's decision on any or all of the issues allowed, denied, or dismissed, you have four options:

(1) **Motion for Reconsideration:** You may file a "motion" asking the BVA to reconsider its decision by writing a letter to the BVA showing why you believe that the BVA committed an obvious error of fact or law in its decision in your appeal, or showing that new and material military service records have been discovered that are applicable to your appeal. If the BVA decided more than one issue, be sure to tell us which issues you want reconsidered. Address your letter to: Director, Administrative Service (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420. The Board places no time limit on filing a motion for reconsideration.

(2) **Motion to Revise the Board's Decision on the Basis of Clear and Unmistakable Error:** You may also file a motion asking that the Board revise its final decision if you believe the decision is based on "clear

and unmistakable error" (CUE). Care should be used in preparing such a motion because it must meet very specific requirements and the Board will not review a final decision on this basis more than once. The Board encourages you to carefully review its Rules of Practice on CUE, 38 C.F.R. §§ 20.1400 - 20.1411 (1999), and *seek help from a qualified representative before filing such a motion. See* "Representation before VA," below. The Board places no time limit on filing a CUE review motion.

(3) **Appeal to the United States Court of Appeals for Veterans Claims:** You have the right to appeal this decision to the United States Court of Appeals for Veterans Claims (known as the United States Court of Veterans Appeals prior to March 1, 1999) (hereinafter, "the Court") if this BVA decision follows a Notice of Disagreement filed on or after November 18, 1988. A Notice of Appeal must be filed with the Court within 120 days from the date of mailing of the notice of the BVA's decision. The date of mailing is the date that appears on the face of the enclosed BVA decision. The Court's address is: The United States Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004. You may obtain information about the form of the Notice of Appeal, the procedure by which you may file your Notice of Appeal with the Court, the filing fee, and other matters covered by the Court's rules directly from the Court. You must also mail a copy of the Notice of Appeal to the VA General Counsel (027), 810 Vermont Avenue, NW, Washington, DC 20420. However, this does not take the place of the Notice of Appeal you must file with the Court. *Filing a copy of your Notice of Appeal*

with the General Counsel, the Board, or any other VA office WILL NOT protect your right of appeal to the Court.

(4) **Reopening your claim:** While it would not affect this BVA decision, you can also ask your local VA Regional Office to reopen your claim. To be successful in reopening your claim, you must submit new and material evidence to that office. VA may not consider another claim on the same factual basis.

You may do one or any combination of the above four things, but filing a concurrent Notice of Appeal with the Court and a motion with the Board may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court before you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission. You will still have time to appeal to the Court after you file a motion for reconsideration with the Board if you file your motion promptly. The Court has held that, if we receive your motion for reconsideration within 120 days from the date we mailed you the BVA's decision, you will still be able to file a Notice of Appeal with the Court within a period of 120 days from the date that the Board mails you either notice that it has denied your motion or notice of its decision on reconsideration.

Representation before VA: You may represent yourself in your claim before VA, including the BVA, or you may appoint someone to represent you. You may appoint an accredited representative of an organization recognized by VA (a "service organization"), or another individual whom you choose, to represent you in your claim. These persons may not

charge you to represent you. In the alternative, you may appoint an attorney-at-law or a VA accredited agent to represent you. These persons may charge you a fee for their services under the following circumstances: (1) you filed a Notice of Disagreement with respect to the claim on or after November 18, 1988; (2) a final BVA decision was subsequently issued with respect to that claim; and (3) you retained the attorney or accredited agent to represent you within one year from the date of the final BVA decision on that claim. An attorney or agent can charge a reasonable fee without meeting these requirements for services provided after October 9,1992, in connection with a proceeding in a case arising out of a loan made, guaranteed, or insured under Chapter 37 of title 38, United States Code. In all VA cases, a copy of any fee agreement between you and an attorney or accredited agent must be filed at this address: Office of the Chief Counsel (O1C), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420. The BVA may review the fee agreement for reasonableness on its own motion, or you or your attorney or accredited agent may file a motion for the BVA to review the fee agreement for reasonableness at the same address at which the agreement was filed.

Representation before the Court: Information about representation before the Court may be obtained by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants.

VA FORM 4597
NOV 1999 (RS)

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2007-7282
(CVA - 05-1165)

[Filed: August 11, 2008]

JACK R. MANSFIELD, SR.,
Claimant-Appellant,

v.

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,
Respondent-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 18, 2008.

FOR THE COURT

/s/ Jan Horbaly / JB
Jan Horbaly
Clerk

Dated: 08/11/2008

cc: Robert P. Walsh
David A. Harrington

MANSFIELD V DVA, 1007-7282
(CVA - 05-1165)

APPENDIX G

OMB Approved NO. 2900-0075
Respondent Burden: 15 minutes

Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

PRIVACY ACT INFORMATION: The law authorizes us to request the information we are asking you to provide on this form (38 U.S.C. 501(a) and (b)). The responses you submit are considered confidential (38 U.S.C. 5701). They may be disclosed outside the Department of Veterans Affairs (VA) only if the disclosure is authorized by the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22, Compensation, Pension, Education and Rehabilitation Records - VA, published in the Federal Register. The requested information is considered relevant and necessary to determine maximum benefits under the law. Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: Public report burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of

information, including suggestions for reducing this burden, to the Clearance Officer (723), 810 Vermont Ave., NW, Washington, DC 20420; and to the Office of Management and Budget, Paperwork Reduction Project (2900-0075), Washington, DC 20503. PLEASE DO NOT SEND THIS FORM OR APPLICATION FOR BENEFITS TO THESE ADDRESSES.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN *(Type or Print)*

Jack-R-Mansfield

SOCIAL SECURITY NO.

[REDACTED] 4528

VA FILE NO.

C/CSS- same SS

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I claim service connection for surgery at the VA Medical Center in Ann Arbor, Mi. in 1989 I claim that my surgery fora Gall Bladder was incorrectly done and that because of this incorrect surgery I now wear a colostomy bag. I content that because of this incorrect surgery that I should be service connected and be able to receive medical care and medications at the expense of the Dept. of Veterans Affairs. I also believe that I should be compensated for this incident.

(CONTINUE ON REVERSE)

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

SIGNATURE	DATE SIGNED
/s/ Jack R. Mansfield	10-5-00

ADDRESS

6317 W. River Dr.
Belmont, Mi. 49306

TELEPHONE NUMBER *(Include Area Code)*

DAYTIME	EVENING
616-363-6528	

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM 21-4138
APR 1994

EXISTING STOCKS OF VA FORM 21-4138, OCT 1993, WILL BE USED.

*U.S. Government Printing Office:
1999 - 719-666/93349

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPR[ ] OMB NO. 1105-0008 EXPIRES 4-30 [ ]

1. Submit To Appropriate Federal Agency:

VETERANS ADMINISTRATION

2. Name, Address of claimant and claimant's personal representative (*See instructions on reverse.*) *(Number, street, city, State and Zip Code.)*

ELAINE MANSFIELD
6317 West River Road
Belmont, Michigan 49306

3. TYPE OF EMPLOYMENT

[X] Military

4. DATE OF BIRTH

[REDACTED]-37

5. MARITAL STATUS

Married

6. DATE AND DAY OF ACCIDENT

3-1-89 through present

7. TIME (*A.M. or P.M.*)

N/A

8. Basis of Claim (*State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved [ ] place of occurrence and the cause thereof) (Use additional pages if necessary.*)

SEE ATTACHED

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (*Number, street, city, State, and Zip Code*)

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (*See [ ] on reverse side.*)

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS

OF THE CLAIM. IF OTHER THAN CLAIMANT NAME OF INJURED PERSON OR DECEDENT.

Because of the injuries sustained by my husband (see attached), I have suffered a loss of services and consortium.

11. WITNESSES

Name:
Jack R. Mansfield, Jr.

ADDRESS (Number, street, city, Sate, and Zip Code)
6317 West River Rd., Belmont, MI 48306

Name:
Elaine Mansfield

ADDRESS (Number, street, city, Sate, and Zip Code)
6317 West River Rd., Belmont, MI 48306

Wendy Wahl, M.D.

Daniel B. Hinshaw, M.D.

SEE ATTACHED FOR ADDITIONAL WITNESSES

12. (*See instructions on reverse*)
AMOUNT OF CLAIM (*in dollars*)

12a. PROPERTY DAMAGE

12b. PERSONAL INJURY

$250,000.00

12c. WRONGFUL DEATH

12d. TOTAL *(Failure to specify m[ ] forfeiture of your rights.)*

$250,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*

/s/

13b. Phone number of signatory

(313) 963-8080

14. DATE OF CLAIM

12/28/90

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING
FRAUDULENT CLAIMS OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more [ ] or both (*See 18 U.S.C. 287, 1001.*)

95-107 NSN 7540-00-634-4046

STANDARD FORM 95 [ ]
Prescribed by DEPT

11. Additional Witnesses:

Other physicians, nurses and other medical personnel who participated in the care and treatment of Jack Mansfield incident to his numerous hospitalizations and admissions through the Veterans Administration Hospitals in Ann Arbor, Grand Rapids, Allen Park and Battle Creek, Michigan.

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPR [ ] OMB NO. 1105-0008 EXPIRES 4-30 [ ]

1. Submit To Appropriate Federal Agency:

VETERANS ADMINISTRATION

2. Name, Address of claimant and claimant's personal representative if a [ ] *(See instructions on reverse.) (Number, street, city, State and Zip Code.)*

JACK MANSFIELD, SR.
6317 West River Road
Belmont, Michigan 49306

3. TYPE OF EMPLOYMENT

[X] Military

4. DATE OF BIRTH

[REDACTED]-30

5. MARITAL STATUS

Married

6. DATE AND DAY OF ACCIDENT

3-1-89 through present

7. TIME (*A.M. or P.M.*)

N/A

8. Basis of Claim (*State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved [ ] place of occurrence and the cause thereof) (Use additional pages if necessary.*)

SEE ATTACHED

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (*Number, street, city, State, and Zip Code*)

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (*See [ ] on reverse side.*)

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS

OF THE CLAIM. IF OTHER THAN CLAIMANT. S NAME OF INJURED PERSON OR DECEDENT.

Permanent and significant pain; diarrhea; passing blood in urine; significant localized pain in the area of the low back to penis on right side; limitation of activity including walking; requires wheelchair assistance; difficulty driving; ongoing digestive problems.

11. WITNESSES

Name:
Jack R. Mansfield, Jr.

ADDRESS (Number, street, city, Sate, and Zip Code)
6317 West River Rd., Belmont, MI 48306

Name:
Elaine Mansfield

ADDRESS (Number, street, city, Sate, and Zip Code)
6317 West River Rd., Belmont, MI 48306

Wendy Wahl, M.D.

Daniel B. Hinshaw, M.D.

SEE ATTACHED FOR ADDITIONAL WITNESSES

12. (*See instructions on reverse*)
AMOUNT OF CLAIM (*in dollars*)

12a. PROPERTY DAMAGE

12b. PERSONAL INJURY

$500,000.00

12c. WRONGFUL DEATH

12d. TOTAL *(Failure to specify m [ ] forfeiture of your rights.)*

$500,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*

/s/

13b. Phone number of signatory

(313) 963-8080

14. DATE OF CLAIM

12/28/90

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of

damages sustained by the United States. (*See 31 U.S.C. 3729.*)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIMS OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 [ ] or both (*See 18 U.S.C. 287, 1001.*)

11. Additional Witnesses:

Other physicians, nurses and other medical personnel who participated in the care and treatment of Jack Mansfield incident to his numerous hospitalizations and admissions through the Veterans Administration Hospitals in Ann Arbor, Grand Rapids, Allen Park and Battle Creek, Michigan.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DIVISION
EASTERN DISTRICT

91cv73811

[Filed: August 2, 1991]

JACK R. MANSFIELD, SR. and ELAINE MANSFIELD,	)
Plaintiffs.	)
vs .	)
UNITED STATES OF AMERICA,	)
Defendant.	)

JODY L. AARON (P34677)
Attorney for Plaintiffs
4000 Penobscot Building
Detroit, Michigan 48226
(313) 963-8080

COMPLAINT

NOW COME Plaintiffs, JACK R. MANSFIELD, SR. and ELAINE MANSFIELD, by and through their attorneys, CHARFOOS & CHRISTENSEN, P.C., and

for their Complaint against the United States of America state as follows:

1. That Jack R. Mansfield, Sr. and Elaine Mansfield currently reside in Belmont, Michigan.

2. That Jack R. Mansfield, Sr. is an honorably discharged veteran of the United States Armed Forces.

3. That at all times pertinent hereto the United States of American, by and through the Veterans Administration, owns and operates a hospital in Ann Arbor, Michigan.

4. That Jack R. Mansfield, Sr. was admitted to the Veterans Administration Hospital facility in Arbor, Michigan for purposes of undergoing cholecystectomy.

5. That Harris Foster, M.D. was the operating surgeon.

6. That incident to the gall bladder procedure, Dr. Foster alleges to have found a firmness in the head of the pancreas.

7. That a lateral duodenotomy was performed in order to biopsy the suspected pancreatic mass.

8. That intraoperative cholangiogram was attempted, but not completed so as to permit visualization of the hepatic system.

9. That a Tru-cut needle was used to do the biopsy of the pancreatic mass.

10. That the enterotomy/duodenotomy was closed with a single layer of sutures.

11. That the needle and/or sponge count was not verified as correct for the procedure before termination.

12. That postoperatively, Mr. Mansfield became septic with an elevated white blood count, back pain and fever.

13. That a CAT scan was done and showed a large pancreatic phlegmon.

14. That Mr. Mansfield was ultimately returned to surgery on March, 14, 1989 where a complete breakdown of the duodenotomy was discovered.

15. That a Dr. Harschel was the operating surgeon.

16. That the duodenotomy hole was partially closed around a T tube.

17. That Jackson drains were used to drain the duodenotomy site.

18. That subsequently, Mr. Mansfield underwent daily dressing changes and debridement for at least seven (7) days.

19. That it became necessary to do a tracheostomy on March 30, 1989.

20. That on April 24, 1989, Mr. Mansfield was found to be cyanotic, bradycardic and hypotensive and

was started on Somatostatin to allegedly decrease fistula output.

21. That subsequent evaluation confirmed stricture of the small bowel, stricture of the portal vein and of the proper hepatic artery as well as obstruction of the right urether.

22. That a uretheral stent was placed on June 7, 1989 by Julian Wan, M.D.

23. That Mr. Mansfield again developed a fever with elevated white blood count and severe back pain.

24. That diagnosis of a duodenal fistula along with a small bowel obstruction was made by way of surgical exploration on June 30, 1989 by Iran Gantz, M.D.

25. That a left lower quadrant abscess also developed and repeatedly drained.

26. That Jack R. Mansfield, Sr. was ultimately discharged from the Veterans Administration hospital facility on September 24, 1989, nearly seven (7) months after his initial admission for gall bladder surgery.

27. That Jack R. Mansfield, Sr. was discharged home with an open wound draining pus and feces from the fistula site.

28. That despite continued medical care and intervention he continued to have great difficulty with abdomen and back pain, diarrhea, wound drainage, painful urination, gastrointestinal discomfort, flank pain radiating into the penis with periodic

incontinence, diminished strength and mobility and overall incapacity and disability, all of which will continue into the future.

29. That at all times pertinent hereto the United States Government by way of the Veterans Administration hospital facility owed to Jack R. Mansfield, Sr. a duty to render medical care in a reasonable and prudent manner consistent with applicable standards.

30. That nevertheless, Jack R. Mansfield, Sr. failed to receive appropriate and necessary medical care and treatment while a patient of the Veterans Administration hospital facility in Ann Arbor, Michigan. That the care provided was grossly inadequate and inconsistent with the applicable standards of the profession and was deficient in at least the following regards:

a. That pancreatic biopsy was done without adequate indication and/or evaluation.

b. That the March 22, 1989 ultrasound indicated liver pathology which mandated that the liver be explored and biopsied which was not done.

c. Duodenotomy was done for pancreatic biopsy which is contrary to applicable standards of care particularly in light of the risks of fistula.

d. An operative cholangiogram should have been done incident to the gall bladder surgery; this was not done.

e. An inappropriate needle was utilized for purposes of doing the biopsy; transduodenal needle should have been used.

f. It was inappropriate and inconsistent with applicable standards of care to have closed the duodenotomy in one layer.

g. It was inappropriate and inconsistent with applicable standards of care to have failed to verify the sponge/needle count before closing the cholecystectomy surgery.

h. It was inappropriate and inconsistent with applicable standards of care to have abandoned attempts at the intraoperative cholangiogram; the procedure should have been completed or repeated.

i. It was inappropriate and inconsistent with applicable standards of care to have utilized percutaneous drainage tubes for the postoperative leak that developed; reoperation was indicated.

j. It was inappropriate and inconsistent with applicable standards of care to have failed to have a single surgeon following and supervising Mr. Mansfield's course of treatment.

k. There was an inappropriate and inordinate delay in recognizing the breakdown of Mr. Mansfield's duodenotomy.

l. That the duodenum T tube in conjunction with a duodenal exclusion was inappropriate

and inconsistent with applicable standards of care.

m. Daily dressing changes and debridement of the open wound were contraindicated and inconsistent with applicable standards of care.

n. The prescription of Somatostatin was contraindicated and inappropriate for duodenal drainage.

o. There was a complete failure of continuity of care with regard to Mr. Mansfield's management during the course of his hospitalization at the Veterans Administration hospital facility in Ann Arbor, Michigan.

31. That as a direct and proximate result of negligence and professional negligence in providing care treatment to Jack R. Mansfield, Sr., Mr. Mansfield the and has sustained numerous and significant personal injuries which include but are not limited to the following:

a. Pain and disability related to bladder and bowel function, abdominal pain, continuous diarrhea, wound drainage, painful urination, flank pain radiating into the penis, periodic incontinence, diminished mobility, strength and overall disability, all of which are permanent and will continue into the future.

32. That at all times pertinent hereto Elaine Mansfield was the lawful spouse of Jack R. Mansfield, Sr. and as such has suffered a loss of services and consortium as a result of the negligence and

professional negligence of the United States of America by and through its operation of the Veterans Administration hospital facility in Ann Arbor, Michigan.

33. That Jack R. Mansfield, Sr. claims damages in the amount of $500,000.00.

34. That Elaine Mansfield claims damages in the amount of $250,000.00.

35. That the above named Plaintiffs will accept $750,000.00 together with the amount of attorney fees legally allowed, in full satisfaction and final settlement of this claim.

36. That Jody L. Aaron of the law firm of Charfoos & Christensen, P.C. is the attorney and duly authorized representative of the above named Plaintiffs.

CHARFOOS & CHRISTENSEN, P.C.

BY: /s/_____
JODY L. AARON (P34677)
Attorney for Plaintiff
4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080

DATED: July 29, 1991

APPENDIX I

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT and RELEASE is entered into this 10th day of February, 1993 by JACK MANSFIELD and ELAINE MANSFIELD, plaintiffs, JODY AARON, Plaintiffs' Attorney, and the UNITED STATES OF AMERICA, Defendant.

I. DEFINITIONS

1. "Plaintiffs" shall mean Jack Mansfield and Elaine Mansfield, their heirs, executors, administrators, assigns, agents, guardians, conservators, partners and associates.

2. "Plaintiffs' Attorney" shall mean Jody Aaron, her heirs, executors, administrators, assigns, agents, guardians, conservators, partners, associates and employees.

3. "Defendant" shall mean the United States of America, its agents and employees.

4. "Settling Parties" shall mean Plaintiffs, Plaintiffs' Attorney and Defendant.

5. "District Court Suit" shall mean the civil action captioned *Jack Mansfield and Elaine Mansfield v. United States of America*, No. 91-CV-73811-DT, on the

docket of the United States District Court for the Eastern District of Michigan.

II. COVENANTS OF THE PARTIES

The Settling Parties, in order to avoid the costs and uncertainties of further litigation, have agreed to compromise and adjust all claims and controversies that exist between the Settling Parties, that were or could have been asserted in the District Court Suit, and therefore, in consideration of the mutual covenants set forth herein, the parties agree as follows:

A. GENERAL RELEASE

Plaintiffs release and forever discharge Defendant from any and every claim, demand, right, action, cause of action, damages or liability of whatsoever kind or nature, whether sounding in contract, tort, or whether based upon any local, state, municipal or federal statute, ordinance or law, whether equitable or legal, whether asserted in an administrative or judicial forum, known or unknown, foreseen or unforseen, whether in their own capacity or as a member of a class, which they ever had, now have or could have had, or which was alleged or could have been alleged in connection with the District Court Suit.

B. CASH PAYMENTS IN SETTLEMENT OF PLAINTIFFS' CLAIMS

In settlement of this case, Defendant will remit two (2) cash payment as follows:

1. Defendant will remit the total sum of ONE HUNDRED TWENTY FIVE THOUSAND DOLLARS ($125,000) in a check payable to Plaintiffs.

2. Defendant will remit the total sum of THIRTY NINE THOUSAND FOUR HUNDRED SEVENTY ONE and 22/100 DOLLARS ($39,471.22) in a check payable to Plaintiffs' Attorney.

3. Said sums shall be in full satisfaction of Plaintiffs' claims against Defendant and include interest, as well as costs, expenses and attorneys fees. Plaintiffs and Plaintiffs' Attorney agree that they shall make no further claim from Defendant for attorneys fees, costs or expenses.

C. MISCELLANEOUS COVENANTS

1. This Settlement Agreement and Release shall not constitute an admission of liability or fault on the part of the United States, its agents, servants, or employees.

2. Plaintiffs agree to dismiss or cause to be dismissed with prejudice the District Court Suit.

3. The Settling Parties agree to execute any and all documents necessary to fully implement this Agreement and give full force and effect to its terms and intents.

4. This Settlement Agreement and Release contains the entire agreement of the Settling Parties with regard to the matters set forth in it and shall be binding upon and inure to the benefits of the executors, administrators and assigns of each. There

are not oral or written agreements, understandings, or representations that vary from or that are in addition to the terms of this Settlement Agreement.

5. In entering into this Agreement, Plaintiffs represent that they are relied upon the legal advice of their attorney, who is the attorney of their own choice, and that the terms of this agreement have been completely read and explained to them by their attorney and that those terms are fully understood and voluntarily accepted by them.

IN WITNESS WHEREOF, the parties hereto, or their duly authorized representatives, execute this Settlement Agreement on the day and year set forth above.

WITNESS:

/s/ Sue P. Mayes
Date: Feb. 5, 1993

/s/ Patricia A. [ ]
Dated: Feb. 5, 1993

/s/ Jack R. Mansfield
JACK MANSFIELD,
Plaintiff

/s/ Elaine Mansfield
ELAINE MANSFIELD,
Plaintiff

/s/Jody Aaron
JODY AARON
Plaintiff's Attorney

STEPHEN J. MARKMAN
United States Attorney

/s/ Jennifer M. Gorland

JENNIFER M. GORLAND
Assistant U.S. Attorney
for Defendant

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 91-cv-73811-DT

[Dated: February 10, 1993]

JACK R. MANSFIELD and ELAINE MANSFIELD,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

HON. BERNARD A. FRIEDMAN

STIPULATION TO DISMISS

The parties, by their undersigned attorneys, having reached a compromise settlement of this matter, stipulate to dismiss this action with prejudice and without costs to either party.

IT IS SO STIPULATED this 10th day of February, 1993.

STEPHEN J. MARKMAN
United States Attorney

/s/
JENNIFER M. GORLAND (P30384)
Assistant U.S. Attorney
Attorney for Defendant
817 Federal Building
Detroit, MI 48226
(313) 237-4706

Attorney for Defendant

/s/
JODY L. AARON (P34677)
5510 Woodward Avenue
Detroit, Michigan 48202
(313) 875-3380

Attorney for Plaintiffs

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 91-cv-73811-DT

[Dated: February 10, 1993]

JACK R. MANSFIELD and ELAINE MANSFIELD,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

HON. BERNARD A. FRIEDMAN

ORDER OF DISMISSAL

Upon review of the parties' stipulation to Dismiss, and the court being otherwise fully advised in the premises,

IT IS ORDERED that the above-captioned matter be dismissed with prejudice and without costs to either party.

IT IS ORDERED this 17th day of February, 1993.

/s/
HON. BERNARD A. FRIEDMAN
U.S. District Judge

A True Copy
Clerk U.S. District Court
Eastern District of Michigan
BY /s/
DEPUTY CLERK

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-7282

[Filed: June 23, 2008]

JACK R MANSFIELD, SR.,	)
	)
Claimant-Appellant,	)
	)
v.	)
	)
JAMES B. PEAKE, M.D.,	)
Secretary of Veterans Affairs,	)
	)
Respondent-Appellee.	)
	)

Appeal from the United States Court of Appeals for Veterans Claims in
05-1165, Judge Lawrence B. Hagel

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF THE PANEL'S DECISION DENYING AN EARLIER EFFECTIVE DATE

Robert P. Walsh, Esq.
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Battle Creek, Michigan 49017

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E-mail: rpwalsh@sbcglobal.net

Attorney for Claimant-Appellant

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MANSFIELD v DVA, 2007-7282

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following individuals have an interest in the outcome of this case:

Jack R. Mansfield, Sr., Claimant, Appellant

Robert P. Walsh, Counsel for the Appellant

Hon. James B. Peake, M.D., Secretary of Veterans Affairs

U.S. Department of Veteran Affairs, Respondent-Appellee

Honorable Lawrence B. Hagel, Judge,

U.S. Court of Appeals for Veterans Claims

Director, Commercial Litigation Branch, Civil Division,

U.S. Department of Justice

David A. Harrington, Esq., Trial Attorney, U.S. Department of Justice

I hereby certify that, to the best of my knowledge, the preceding list is a complete list of all parties having an interest in the outcome of this case.

Furthermore, pursuant to F.R.A.P. 26.1, the Appellant submits that he is not a corporation, has no corporate affiliation, and this case does not have any affiliation with any non-government corporate entity.

by:_____ Date: June 23, 2008

Robert P. Walsh, Esq.
Attorney for the Appellant
Jack R. Mansfield, Sr.

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APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF THE PANEL'S DECISION DENYING AN EARLIER EFFECTIVE DATE

The Appellant respectfully petitions the Court for a panel rehearing and for rehearing en banc of the panel's decision denying an earlier effective date under Federal Circuit Rules 35 and 40.

4. STATEMENT OF COUNSEL

In accordance with Fed. Cir. Rule 35(b) (2) counsel for the Appellant, Mr. Jack R. Mansfield, Sr., states as follows:

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Court:

Brown v. Gardner, 513 U.S. 115 ; 115 S. Ct. 552 (1994); Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); and Roberson v. Principi, 251 F.3d 1378 (Fed. Cir. 2001).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

A. Whether the action filed under the Federal Tort Claims Act in the U.S. Federal District Court for the Eastern District of Michigan, docket number 91 CV 73811 DT, on August 2, 1991, and the Form SF-95 filed with the Secretary on January 3, 199, placed the

Secretary on notice of his claim under 38 U.S.C. § 1151.

B. Whether the failure of the Secretary to adjudicate the claim for benefits under 38 U.S.C. § 1151 for almost 10 years rose to the level of a violation of the due process clause of the 5th Amendment to the U.S. Constitution.

C. Whether 38 C.F.R. § 3.400 (i) mandates an effective date of January 3, 1991 as a matter of law.

Robert P. Walsh-Michigan Bar P-42833
Attorney for Claimant-Appellant
Jack R. Mansfield, Sr.

Date: June 23, 2008

5. ERRORS OF LAW AND FACT IN THE DECISION OF MAY 12, 2008

ERRORS OF LAW

As set forth above, further review of this appeal is warranted because the panel's decision affirms the application by the Court below of a stricter standard of proof to the existence of a veteran's claim which markedly conflicts with the prior decisions of this Court in Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998) and Roberson v. Principi, 251 F.3d 1378 (Fed. Cir.2001), making reconsideration by the full Court necessary to secure uniformity of the Court's decisions. Moreover, this decision involves a question of exceptional importance, *i.e.* where veterans' claims resulting from a negligent act during treatment at a

Veterans Affairs medical facility will require a specific application for benefits in clear violation of 38 C.F.R. §§ 150 (c) and 3.400 (i). This is a matter of first impression and if the present decision is allowed to stand it will dismantle the carefully tailored inter-coordination between the processing of Federal Tort Claims Act negligence claims and those filed under the authority of 38 U.S.C. § 1151 with the U.S. Department of Veterans Affairs. This would mark a quantum shift away from the non-adversarial processing of veterans' claims envisioned by Congress and is a departure from the prior decisions of this Court.

ERROR OF FACT

The review of the decision of the VA executive that a claim existed in June of 1993 is an error of fact that has adversely influenced the outcome of this appeal.

6. ARGUMENT

CLAIM

A. Whether the action filed under the Federal Tort Claims Act in the U.S. Federal District Court for the Eastern District of Michigan, docket number 91 CV 73811 DT, on August 2, 1991, and the Form SF-95 filed with the Secretary on January 3, 1991, placed the Secretary on notice of his claim under 38 U.S.C. § 1151.

The panel of the Court which rendered the opinion of May 12, 2008, seemed fixated on whether there is a writing expressing intent to file a claim for benefits under 38 U.S.C. § 1151 prior to the June 11, 1993,

effective date presently assigned. Their inquiry was conducted in a very formalistic manner in an effort to meet the letter of the veterans law and regulations. This is clearly at odds with the Congressional mandate that the U.S. Department of Veterans Affairs (hereinafter VA) act in a non-adversarial and claimant friendly manner.

The panels' inquiry regarding the pre requisite claim is unwarranted. There was a claim already existing when the Director of Compensation and Pension penned his letter in June of 1993. We know that because the Director told us that there was. The Director's letter of June 11, 1993 states in referent part " Review of the claims folder reveals a claim for benefits has been filed which meets the requirements of 38 CFR Sec. 3.154. . . .Upon completion of the required development, the material received, together with the claims folder, should be referred to the rating board for a decision as to entitlement to benefits under 38 U.S.C. Sec.1151." The language is clear. There is no indication of equivocation and there is no precatory language such as "if a claim" or "when a claim is filed". The Director clearly states that a claim "has been filed".

The SF-95 and Summons and Complaint filed in Federal District Court set forth facts and allegations in enough detail to place the V.A. on notice of the injuries suffered due to negligent hospital care and thus to meet the standard for an informal claim. There is adequate notice to the V.A. of the §1151 claim of Mr. Mansfield. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The same transaction and occurrence forms the factual and legal basis for both claims.

DUE PROCESS OF LAW

B. Whether the failure of the Secretary to adjudicate the claim for benefits under 38 U.S.C. § 1151 for almost 10 years rose to the level of a violation of the due process clause of the 5th Amendment to the U.S. Constitution.

The Court notes that Mr. Mansfield has been afforded a great deal of process. We need only return to the date on the letter from Mr. Hickman to understand his argument. The determination by the Board of Veterans Appeals and the Court below that no claim was submitted was not adopted by Judge Greene in the first review of the matter, U.S. Court of Appeals for Veterans Claims docket number 02-2230. What Mr. Mansfield has had is negligent and life threatening medical care and now delay compounded by the "scorched earth" litigation posture adopted by the Secretary.

Mr. Justice Jackson in his dissent in Federal Crop Insurance Corp. v. Merrill et al, 332 U.S. 380; 68 S. Ct. 1 (1947), could have been writing of this case when he observed " It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one way street."

Mr. Mansfield does not understand why the VARO staff in Detroit refused to comply with the instructions found in the letter of June 11, 1993. He does not speculate on why the V.A. adjudicators folded their arms, turned their backs, and refused to properly adjudicate the §1151 claim, comply with 38 C.F.R.

§§ 3.150 (c) and 3.400 (i), and assign the proper effective date for the claim.

PROPER EFFECTIVE DATE

C. Whether 38 C.F.R. § 3.400 (i) mandates an effective date of January 3, 1991 as a matter of law.

The Director of Compensation and Pension determined that the statutory and regulator requirements had been met. The fact that the VA has furnished an incomplete record, or has lost or destroyed relevant documents should not cut against this or any other appellant. In fact, the only writing that now exists and is present in the record under review that would have caused the Director to be aware of a claim would have been the Form SF-95 filed on January 3, 1991. Under 38 C.F.R. § 3.150 (c) the language is clear and unambiguous:

> " When disability or death is due to Department of Veterans Affairs hospital treatment, training, medical or surgical treatment, or examination, a specific application for benefits will not be initiated."

Mr. J. Gary Hickman, then Director, VA Compensation and Pension Service, ruled that a claim had been filed as evidenced by the plain language in his letter of June 11, 1993. The Director of Compensation and Pension Service is a senior executive in the Department of Veteran Affairs. We must assume that the person entrusted with this level of responsibility is conversant with the statutes and regulations which govern the processing of claims.

The Secretary has scoured the record in an effort to defeat the assertion of the Appellant that he is entitled to an earlier effective date under what is a clear and appropriate application of the regulations. The Secretary is required to follow the rules which have been promulgated. See Brown v. Gardner, 513 U.S. 115 (1994). The May 12, 2008 decision of the Court is contrary to prior opinions. See Roberson v. Principi, 251 F. 3d 1378 (Fed. Cir. 2001).

EFFECTIVE DATES IN CLAIMS UNDER 38 U.S.C. § 1151

C. Whether 38 C.F.R. § 3.400 (i) mandates an effective date of January 3, 1991 as a matter of law.

The only regulation available to assign effective dates in claims filed under 38 U.S.C. § 1151 is 38 CFR § 3.400 (i).

38 CFR § 3.400 (i):

" (i) Disability or death due to hospitalization, etc. (38 U.S.C. 5110 (c), (d); Pub. L. 87-825; §§3.358, 3.361, and 3.800) -- (1) Disability. Date injury or aggravation was suffered if claim is received within 1 year after that date; otherwise, date of receipt of claim.

* * *

[26 FR 1570, Feb. 14, 1961, as amended at 30 FR 133, Jan. 7, 1965; 67 FR 40867, June 14, 2002]

38 U.S.C. 501(a).

[EFFECTIVE DATE NOTE: 67 FR 40867, June 14, 2002, revised the cross reference at the end of the section, effective June 14, 2002.] "

The failure of the Secretary to follow these regulations was legal error. The Court should not endorse this position.

What documents were available for review by the Director of Compensation and Pension Service we cannot know, and are not permitted to speculate on.

Whether the Secretary agrees or disagrees with the determination that his executive made in June of 1993, that decision is now beyond review. That train has left the station. The dispute that has occupied so much of the resources of the Secretary and the courts is quite elementary. Having decided that a claim was filed, and given the record before the Court, the regulations, fair play and common sense demand that the date of receipt of the Form SF-95, January 3, 1991, be adopted as the earliest possible effective date for this claim.

INCOMPLETE RECORD

The Court properly indicates that the Appellant has stated that he was not aware that he could submit a claim for section 1151 benefits (Opinion, FN 12, p. 13). This is true, however, Mr. Mansfield was represented by counsel at all stages of his Federal Tort Claim Act litigation. Due to the untoward delay in processing the section 1151 claim caused by the VARO in Detroit the original litigation file was destroyed by his attorney in the tort claim litigation.

It appears that counsel for Mr. and Mrs. Mansfield had taken the necessary action to perfect a claim under section 1151 as demonstrated by the letter dated June 11, 1993.

The Secretary now proposes, and the Court adopts, a position which is without legal authority. The 1993 effective date reduces the compensation of the Appellant by almost two and one half years. A significant impact upon Mr. Mansfield and his family. In order to accomplish this the Board and the Court below engaged in speculation as to what documents Mr. Hickman did or did not have available for review. Improper in any context, but especially so in determining the outcome of a claim for veterans benefits.

7. CONCLUSION

The decision of the panel of the United States Court of Appeals for the Federal Circuit of May 12, 2008, denying Mr. Mansfield an earlier effective date for his disability benefits under 38 U.S.C. § 1151 as required by 38 C.F.R. § 3.400 (i) contains errors as set forth above. A rehearing is necessary to properly decide this matter of first impression by the Court. Mr. Mansfield must be awarded benefits commencing January 3, 1991. The relevant regulation does not permit any other outcome.

This Court should not endorse the position of the Secretary, which is contrary to his own regulations and is an impermissible collateral attack on the prior decision of his own department.

Respectfully submitted, Date: June 23, 2008

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[Certificate of Compliance, Certificate of Service and Addendum are omitted in this appendix]

APPENDIX M

June 11, 1993

Director (00/21)	211C
VA Regional Office	SS [REDACTED]28
Detroit, MI	MANSFIELD, Jack R., Sr.

Subject: Settlement of Administrative Tort Claim

A tort claim was filed against the Government by the veteran. The veteran alleged negligence by medical staff at Ann Arbor VAMC on March 1, 1989, and treatment thereafter. The veteran alleged inadequate gallbladder surgery. This claim was settled for $164,471.22. Such settlement does not represent an admission of negligence by the Department of Veterans Affairs.

Where a tort claim against the United States is concluded on or after December 1, 1962, by judgment, settlement, or compromise based on the same disability or death for which entitlement to benefits is established under 38 U.S.C. § 1151, such benefits are subject to offset under 38 CFR § 3.800(a)(2).

Review of the claims folder reveals a claim for benefits has been filed which meets the requirements of 38 CFR § 3.154. Accordingly, development should be undertaken in accordance with M21-1, part IV, ¶ 22.03 et seq. Upon completion of the required development, the material received, together with the claims folder, should be referred to the rating board for

a decision as to entitlement to benefits under 38 U.S.C § 1151. If the decision is favorable, benefits payable will be subject to offset as explained above. In any event, the amount of the settlement received by the veteran is countable as income for pension purposes.

J. Gary Hickman, Director
Compensator and Pension Service

TO ACCOMPANY FOLDER